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Supreme Court, U.S.
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No. 08-09-3

IN THE

Supreme Court of the United States

DAEWOO ENGINEERING & CONSTRUCTION CO., LTD.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Contract Disputes Act provides that, "[i]f a contractor is unable to support any part of his claim [for relief under a government contract] and it is determined that such inability is attributable to misrepresentation of fact or fraud on the part of the contractor, he shall be liable to the Government for *an amount equal to such unsupported part of the claim*." 41 U.S.C. § 604 (emphasis added). In this case, the Federal Circuit concluded that petitioner had submitted a claim for projected damages under a contract without properly determining the scope of the government's fault. The court of appeals held that the government was entitled to a penalty equal to the full amount of petitioner's projected claim under the Act – $50.6 million – as opposed to the far smaller amount by which the projection was actually overstated.

The question presented is:

When a government contractor submits a claim without sufficiently determining the amount of the government's liability, is the proper measure of the penalty the amount of the entire claim or instead the narrower amount by which the claim is found to overstate the government's liability?

RULE 29.6 DISCLOSURES

Petitioner Daewoo Engineering & Construction Co., LTD. states that Kumho Asiana Group owns ten percent or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Daewoo Engineering & Construction Co., LTD. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Federal Claims (App. 22a) is published at 73 Fed. Cl. 547 (2006). The opinion of the U.S. Court of Appeals for the Federal Circuit (App. 3a) is published at 557 F.3d 1332 (2009).

JURISDICTION

The court of appeals denied a timely petition for rehearing and rehearing en banc on April 27, 2009. *See* App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

41 U.S.C. § 604 provides:

> If a contractor is unable to support any part of his claim and it is determined that such inability is attributable to misrepresentation of fact or fraud on the part of the contractor, he shall be liable to the Government for an amount equal to such unsupported part of the claim in addition to all costs to the Government attributable to the cost of reviewing said part of his claim. Liability under this subsection shall be determined within six years of the commission of such misrepresentation of fact or fraud.

STATEMENT OF THE CASE

The United States contracted with petitioner Daewoo Engineering & Construction Co., LTD. (DWEC) to build a road on the island nation of Palau. While the project was underway, DWEC submitted a certified claim alleging that the original contract specifications were flawed and requesting that the government pay certain additional costs, some of which were already incurred and some of which were projected to occur in the future. The Federal Circuit concluded that petitioner had submitted the projected portion of its claim without sufficiently determining the scope of the government's liability. The court of appeals acknowledged that claims for projected costs are permissible and that the legal theories underlying petitioner's projected claim were not themselves fraudulent. Nonetheless, the court of appeals held that the government was entitled to a penalty equal to the entire amount of the projected portion of petitioner's claim, rather than the far smaller amount by which the claim actually overstated the government's liability.

1. Petitioner DWEC is one of the world's leading construction companies. The company is regularly retained to complete projects in some of the most challenging environments in the world. DWEC has been cited as the top domestic contractor by Korea's Ministry of Construction and Transportation (since 2008, the Ministry of Land, Transport and Maritime Affairs) and the Construction Association of Korea on multiple occasions.

In 1999, the United States retained DWEC to build a fifty-three-mile road on the island of Babeldaob in the Republic of Palau. The U.S. Army

Corps of Engineers (Corps) specified to the bidders that the road could be built in 1080 days using the construction methodology specified by the contract. *See* Request for Proposal – Specifications for Palau Compact Road § 800-31. The Corps also specified the amount of weather-related delay the contractor should expect. *See id.* at § 800-1. The Corps failed to fully account, however, for the tremendous volume of rain in Palau, which saturated the ground and seriously impeded the critical construction of earthen embankments. As a consequence, completion of the road took an extraordinary seven years. DWEC ultimately incurred roughly $100 million in losses on the project.

A government contractor may seek to recover unanticipated costs by submitting a "request for equitable adjustment" setting forth a "claim." *See* 41 U.S.C. § 605. During the course of construction, in 2002, DWEC submitted a claim to the Corps. *See* App. 50a. The focus of DWEC's submission was that the Corps had severely underestimated the anticipated weather-related delays that it required DWEC to rely on in preparing its schedule. DWEC maintained that the problem could best be solved through a change in the standard for the "compaction" of soil.

According to DWEC's calculations in its claim, the project would take an extra 928 days to complete beyond the Corps' initial estimate, producing significant cost overruns. DWEC's claim explained that it had incurred 153 days of delay to date, resulting in $13.3 million in "damages incurred." DWEC further stated that, if the contract specifications were not modified, it anticipated a

further 775 days of delay, resulting in "projected damages" of $50.6 million that it "reserve[d] the right" to pursue. Regarding the latter projection, DWEC openly sought to persuade the government to change the construction specifications to avoid the anticipated delays and tens of millions of dollars in costs.

After the Corps' contracting officer denied DWEC's claim, petitioner timely appealed by filing a complaint in the U.S. Court of Federal Claims. *See* 28 U.S.C. § 1491(a)(1). After the close of petitioner's case at trial, the United States asserted, *inter alia*, that DWEC's claim was fraudulent under Section 604 of the Contract Disputes Act. That statute provides for a penalty in strict proportion to the false elements of a claim submitted by a contractor:

> If a contractor is unable to support any part of his claim and it is determined that such inability is attributable to misrepresentation of fact or fraud on the part of the contractor, he shall be liable to the Government for an amount equal to such unsupported part of the claim.

41 U.S.C. § 604.

The Court of Federal Claims received extensive evidence on the validity of petitioner's claim. DWEC submitted significant evidence that the claim was meritorious.[1] The court found, however, that certain

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[1] *See, e.g.*, U.S. Army Corps of Engineers Briefing dated Nov. 7, 2001; After Action Review dated Nov. 5, 2001; Memorandum for Record from R. Kong dated Jan. 5, 2002; Expert Report of H. Fredrich dated April 30, 2004; Exponent Expert Report dated May 31, 2004; and SKD Engineers Expert Report dated April 30, 2004.

specific components of petitioner's projection were false or inflated. App. 140a n.80. For example, the court found that petitioner improperly measured its cost for acquiring certain replacement equipment based on figures in a government manual rather than its own actual acquisition costs, whereas "rates used in the Manual are generally higher than actual costs." App. 139a.

But the court went further and deemed the entirety of petitioner's projection – even those elements that accurately stated the government's liability – to be "fraudulent" because petitioner's *purpose* in submitting the claim was to persuade the government to change the contract terms. The court reasoned that this purpose rendered the claim a fraudulent "negotiating ploy": DWEC "made the claim for purposes other than a good faith belief that the Government owed Daewoo that amount. Plaintiff in fact did not believe that the Government owed it $64 million as a matter of right." App. 119a. The court reasoned:

> The "part of [the] claim" that is fraudulent without question is $50,629,855.88 [*i.e.*, the projection]. Plaintiff's authorized official certified this claim and presented it to the contracting officer as costs "to be incurred after December 31, 2001." The certifying official, Mr. Kim, testified that he submitted the claim to get the Government's attention. He wanted the Corps to know how much it would cost the Government if [the Corps' official] did not approve the new compaction method that plaintiff preferred.

App. 148a.

The U.S. Court of Appeals for the Federal Circuit, which has exclusive jurisdiction to hear appeals under the Act, affirmed. App. 3a. The court of appeals noted that the trial court had accepted testimony proffered by the government that "*certain specific items* in the incurred costs portion of Daewoo's certified claim, including duplicate costs, overstated equipment costs, and overhead rates, were fraudulent." App. 12a n.5 (emphasis added). But it furthermore recognized that the "portion of the claim found to be fraudulent represented the projected costs of completion of the contract" *in toto*, rather than particular elements found to have been inflated. App. 7a.

The Federal Circuit did not, however, embrace the Court of Federal Claims' view that petitioner's purpose in seeking to persuade the government to change the contract terms was fraudulent, and hence justified imposing damages in the full amount of the projection. Petitioner had argued that it is in fact essential to preserving the public fisc that contractors submit projections in order to alert the government as soon as practicable to projected cost overruns if the contract terms remained unchanged. The government similarly agreed that such "claims for future costs are permissible." App. 8a. The Federal Circuit accordingly accepted that a contractor may permissibly seek projected future costs in a CDA claim. *Ibid.*

The Federal Circuit nonetheless held that the proper measure of the damage award was the entirety of the projection, rather than the assertedly false individual components. The court of appeals acknowledged that the trial court did not find the

legal theories underlying Daewoo's claim to be fraudulent, but rather found the "calculation" of the projected damages to be fraudulent. App. 13a. The court of appeals reasoned that "it is well established that a baseless certified claim is a fraudulent claim." App. 16a. Here, the panel reasoned, petitioner had submitted a claim "without even considering whether there was any contractor-caused delay or delay for which the government was not responsible. The calculation then simply assumed that Daewoo's current daily expenditures represented costs for which the government was responsible." App. 13a. The court of appeals accordingly affirmed the award of more than $50 million and refused to consider petitioner's argument that the Court of Federal Claims erred in finding that individual components of its claim were fraudulent. App. 12a n.5, 16a.

The court of appeals denied petitioner's timely request for rehearing and rehearing en banc. App. 1a.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the court of appeals' authoritative interpretation of the principal federal statute governing claims brought by and against government contractors is in direct conflict with Congress's intent. The ruling below will discourage companies from contracting with the government, for fear that they will be exposed to crippling multi-million-dollar penalties if they ever submit claims that are later deemed even partially inaccurate. Because the Federal Circuit has exclusive appellate jurisdiction to hear appeals under the Contract Disputes Act, and the court has denied

petitioner's request for rehearing en banc, only this Court can correct this seriously flawed ruling.

1. The Contract Disputes Act provides that, if a government contractor submits a claim that it cannot "support [in] part" due to a "misrepresentation of fact or fraud," then it "shall be liable to the Government for an amount equal to such unsupported part of the claim." 41 U.S.C. § 604. The statute could not be clearer: in such a case, the penalty to which the government is entitled is limited to the amount of the "unsupported" part of the claim that results from fraud. The contractor is not thereby rendered liable for a penalty in the entire amount of its claim, which (as in this case) may be vastly larger.

A hypothetical illustrates the statute's plain meaning. If a contractor submits a claim for reimbursement of five pieces of equipment, inflating the cost of the fifth, its liability under the Contract Disputes Act is measured by that specific exaggeration of the cost, which is the "unsupported *part* of the claim." To be sure, the contractor may *also* be liable under other statutes, and may in certain circumstances be subject to debarment as a government contractor (*see, e.g.*, 28 U.S.C. § 2514 and 31 U.S.C. § 3729), but the penalty applicable under the Contract Disputes Act extends no further.

Congress's determination to adopt a calibrated scheme for determining the scope of contractors' liability is obvious. Congress imposed a penalty only to the extent a contractor seeks payment for "an amount beyond which can be legitimately claimed." S. Rep. No. 95-1118, at 20 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5235, 5254. By contrast, "[t]o the extent that contractors set forth claim items and

costs on which they can submit a legitimate argument for recovery, [the Act] would not apply." *Id.* at 5254. The statute notably does not include a more punitive provision – common to other statutory schemes (*e.g.*, 15 U.S.C. § 15 (treble damages available under the antitrust laws)) – that would impose a multiple of damages.

2. The Federal Circuit's decision in this case cannot be reconciled with the plain text of the Contract Disputes Act or Congress's clear purpose in enacting the statute. Petitioner submitted a request for equitable adjustment of its contract that included a projection of roughly $50 million in future costs. As the court of appeals recognized, the Court of Federal Claims did not find that the underlying legal theories were fraudulent, such that *all* the amounts claimed would be fraudulent. The trial court moreover found only that "certain specific items" in petitioner's claim were unsupported. App. 140a n.80. The trial judge deemed it improper, for example, for petitioner to measure its costs for acquiring equipment based on amounts set forth in a government manual, rather than attempting to measure its own expenses. App. 139a. The trial evidence showed that much of the petitioner's projection was accurate, or at least non-fraudulent. *See, e.g.*, Exponent Expert Report dated May 31, 2004; Rubino & McGeehin Expert Report dated May 23, 2005; and Cotton Expert Report dated July 15, 2004.[2]

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[2] As noted, although the trial judge labeled the $50.6 million "fraudulent" in toto (App. 148a), that characterization rested on the incorrect legal premise that it was impermissible for

Assuming the trial court's finding that certain elements of petitioner's projection were false – despite the court of appeals' refusal to consider petitioner's challenge to that finding (App. 12a n.5) – the government should have been awarded a penalty measured by the specific amount by which petitioner's claim was inflated. But the Court of Federal Claims never even bothered to determine the extent to which petitioner's claim was unsupported. Indeed, as the Federal Circuit acknowledged, the trial judge concluded that the $13.3 million incurred cost claim could have been supported by "alternative methodologies" that were not necessarily fraudulent. App. 16a. That same logic applies to the projected $50.6 million future costs and underscores the lower courts' failure to determine the "part" of petitioner's claim that was "unsupported."

The trial judge no doubt deemed that calculation unnecessary based on his view that petitioner's entire projection was fraudulent because petitioner submitted it with the intent of persuading the Army Corps of Engineers to "approve [a] new compaction method." App. 148a. But it defies all logic to hold that a contractor commits fraud merely by trying to persuade the government to change the terms of the contract – particularly when motivated by the prospect of cost overruns. It is therefore not surprising that the court of appeals did not adopt that reasoning.

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petitioner to submit a projection in an effort to persuade the government to change the contract terms.

The Federal Circuit nonetheless approved a penalty equaling the entire $50.6 million projection, based on different reasoning. The panel stated that, in submitting the projection, petitioner measured the potential costs based on delays in completing the project without determining if there "was any contractor-caused delay or delay for which the government was not responsible." App. 13a. That is to say, petitioner potentially overstated the government's liability.

The court of appeals' reasoning conflicts directly with the Contract Disputes Act. In holding that the award was proper – notwithstanding that only "certain" elements of the projection were unsupported (App. 12a n.5) – the court of appeals collapsed the distinct questions of petitioner's liability and the proper size of the resulting penalty under the Act. Congress directed the courts to determine the "part" of the claim that is "unsupported," and to impose a penalty in that amount, not more.

In support of its startlingly broad penalty theory, the Federal Circuit did not cite any provision of the Contract Disputes Act or any case decided under that statute. Rather, it criticized petitioner for submitting its claim without "considering whether there was any contractor-caused delay or delay for which the government was not responsible." App. 13a. Even assuming that is accurate, at most it establishes that petitioner may have *liability* under the Act for submitting a claim that was erroneous in part because of a "misrepresentation of fact or fraud." 41 U.S.C. § 604. The court of appeals' reasoning ignores, however, the critical requirement that by statute the

resulting *penalty* is limited to "an amount equal to such unsupported part of the claim." *Id.*

The ruling below cannot be sustained on the alternative theory that petitioner's supposed failure to fully investigate the government's responsibility for cost overruns renders it liable for the complete amount of the projection, without regard to the amount by which the faulty investigation caused the claim to be erroneously inflated. On that theory, a contractor that submitted a *completely valid* claim without sufficiently investigating the government's liability would not only have that claim denied, but would be forced to pay the government damages in the full amount of the claim. That result would fly in the face of Congress's command to limit the amount of damages to the specific "unsupported part" of the claim (41 U.S.C. § 604).

The appropriate course, accordingly, was to remand this case to the trial court for a revised assessment of the penalty in the amount by which petitioner's claim was unsupported.

3. Certiorari is also warranted in light of the undeniable importance of the question presented. The federal government annually awards hundreds of billions of dollars in contracts. *See* http://www.usaspending.gov ($526 billion in contracts awarded in FY2008). That figure is rapidly expanding. *Id.* (showing dollar value of annual contract awards has more than doubled since FY2000). Every claim by a contractor seeking an award of additional costs must proceed under the provisions of the Contract Disputes Act, which governs all executive agency contracts for the procurement of property (except real property),

services and construction, as well as contracts for the disposal of personal property. 41 U.S.C. § 602. Thousands of such claims are submitted every year. *Cf.* U.S. Court of Federal Claims – Cases Filed, Terminated, and Pending for the 12-Month Period Ending September 30, 2008 http://www.uscourts.gov/judbus2008/appendices/G02ASep08.pdf (for the twelve-month period ending September 30, 2008, 14.7% of the cases filed in the Court of Federal Claims were contracts cases). The ruling in this case governs every one of those disputes. The Federal Circuit's denial of rehearing en banc firmly commits that court to the ruling below. *Compare Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803 (2003) (review granted to decide far narrower question whether Contract Disputes Act applies to concession contracts); *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 400 (1966) (review granted "because of the importance of [questions about the coverage of government contract disputes clause] in the administration of government contracts").

As Congress explained in enacting the Contract Disputes Act:

> How procurement functions has a far-reaching impact on the economy of our society and on the success of many major Government programs. Both can be affected by the existence of competition and quality contractors – or by the lack thereof. The way potential contractors view the disputes-resolving system influences how, whether, and at what prices they compete for Government contract business.

S. Rep. No. 95-1118, at 4, *reprinted in* 1978 U.S.C.C.A.N. 5235, 5238. The failure to reverse the ruling below will materially undercut the government's ability to accomplish the vital missions of innumerable projects that depend on private contracting. Would-be contractors will reasonably fear being subjected to enterprise-threatening liability on the theory given precedential sanction in this case – a *post hoc* determination that the contractor submitted a claim without complete accuracy, triggering not merely a denial of the claim but affirmative liability in the amount of the entire claim rather than just the far narrower component deemed to be unjustified. At the very least, contractors worried at the prospect of such a crippling award will be far less likely to submit claims that identify projected cost overruns that could give the government advanced notice that could result in contract modifications and significant savings.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 26, 2009

APPENDIX

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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United States Court of Appeals for the Federal Circuit

2007-5129

DAEWOO ENGINEERING AND CONSTRUCTION CO., LTD., Plaintiff-Appellant,

v.

UNITED STATES, Defendant-Appellee.

Appeal from the United States Court of Federal Claims in 02-CV-1914, Senior Judge Robert H. Hodges, Jr.

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the Appellant, and the petition for rehearing, having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on May 4, 2009.

FOR THE COURT,
Jan Horbaly
Clerk

Dated: 04/27/2009

cc: Thomas P McLish
Donald E. Kinner

DAEWOO ENGINEERING V US, 2007-5129
(CFC-02-CV-1914)

United States Court of Appeals for the Federal Circuit

DAEWOO ENGINEERING AND CONSTRUCTION CO., LTD., Plaintiff-Appellant,

v.

UNITED STATES, Defendant-Appellee.

No. 2007-5129

Feb. 20, 2009

Before MAYER, FRIEDMAN, and DYK, Circuit Judges.

DYK, Circuit Judge.

Daewoo Engineering and Construction Co., Ltd. ("Daewoo" or "the contractor") brought suit in the Court of Federal Claims, alleging that the United States breached a contract between Daewoo and the United States to build a road in the Republic of Palau. The United States counterclaimed, alleging violations of the False Claims Act, 31 U.S.C. § 3729, and the Contract Disputes Act, 41 U.S.C. § 604, and seeking forfeiture of Daewoo's claims pursuant to 28 U.S.C. § 2514. Daewoo Eng'g & Const. Co. v. United States, 73 Fed.Cl. 547, 597 (2006). The Court of Federal Claims held that Daewoo had committed fraud.

The court awarded the government $10,000 for Daewoo's False Claims Act violation and $50,629,855.88 for Daewoo's Contract Disputes Act

violation. Id. at 597. It also held that Daewoo's claims were forfeited under 28 U.S.C. § 2514. Id. We affirm.

BACKGROUND

In 1998, pursuant to a 1994 treaty between the United States and the Republic of Palau, the United States Army Corps of Engineers ("government") solicited bids for the building of a fifty-three-mile road around the island of Babeldaob in the Republic of Palau. The government estimated that the price of constructing the road would be between $100 million and $250 million. Daewoo initially proposed to build the road for $73 million. Daewoo was the lowest bidder by far, with the next lowest bidder proposing $100 million. After the government questioned this price, Daewoo revised its proposal and submitted a final bid of $88.6 million. On March 30, 1999, the government awarded Daewoo the contract for constructing the road. The contract required completion of the road within 1080 days, a period which began in October 2000.

Construction of the road was subsequently delayed. Daewoo attributed these delays to the humid and rainy weather and moist soils in Palau, and urged the government to reduce the amount of soil compaction required by the contract. After discussing these delays with Daewoo, the government reduced the amount of soil compaction the contract had specified for parts of the road.

On March 29, 2002, Daewoo submitted to the Government a request for equitable adjustment. In this certified claim, Daewoo sought adjustment of the contract price and the time to perform the contract,

alleging that the contract used defective specifications, that the government breached its duties to cooperate and to disclose superior knowledge, and that the contract was impossible to perform within the originally specified time period. Daewoo requested $13,348,793.07 in "additional costs as of December 31, 2001" and, in the government's view, also requested $50,629,855.88 in "costs January 1, 2002[and] [f]orward," a total of $63,978,648.95 ("$64 million"). Daewoo rejected the government's offer of a bilateral time adjustment, and the contracting officer denied Daewoo's claim in August 2002.

Daewoo filed a complaint with the Court of Federal Claims in December 2002, seeking, "with respect to damages suffered through December 31, 2001," an increase in the "compensable and non-compensable contract performance time" of 8 noncompensable and 122 compensable days and "monetary relief in the amount of $13,348,793.07," and "with respect to damages suffered from January 1, 2002, through contract completion," an increase in the "compensable contract performance time" of 776 days and "monetary relief in the amount of $50,629,855.88." Compl. 19-21. The government counterclaimed for damages, seeking $64 million under the Contract Disputes Act and $10,000 under the False Claims Act. The government also entered a special plea in fraud and sought forfeiture of Daewoo's claims under 28 U.S.C. § 2514.

The Court of Federal Claims awarded the government $10,000 under the False Claims Act and $50,629,855.88 ("$50.6 million") under the Contract Disputes Act, and forfeited Daewoo's claims under §

2514. Daewoo Eng'g, 73 Fed.Cl. at 597. The Court of Federal Claims concluded that the government "showed by clear and convincing evidence that the contractor knowingly presented a false claim with the intention of being paid for it," thus supporting the $50.6 million penalty under the Contract Disputes Act, the $10,000 award under the False Claims Act, and forfeiture of Daewoo's claims. Id. at 584. Alternatively, the Court of Federal Claims analyzed and rejected on the merits Daewoo's claims that the road construction contract had contained a misleading weather-delay clause and defective road design specifications, that the government breached its duty to disclose its superior knowledge of its weather-delay calculation methods, and that the contract was thus impossible to perform. See id. at 561-68.

Daewoo timely appealed. We have jurisdiction under 28 U.S.C. § 1295(a)(3).

DISCUSSION

We review legal conclusions of the Court of Federal Claims de novo, and we review its factual findings under a clearly erroneous standard. See UMC Electronics Co. v. United States, 249 F.3d 1337, 1339 (Fed.Cir.2001).

I

Under the antifraud provision of the Contract Disputes Act, 41 U.S.C. § 604, "[i]f a contractor is unable to support any part of his claim and it is determined that such inability is attributable to misrepresentation of fact or fraud on the part of the contractor, he shall be liable to the Government for an amount equal to such unsupported part of the

claim." A "misrepresentation of fact" is "a false statement of substantive fact, or any conduct which leads to a belief of a substantive fact material to proper understanding of the matter in hand, made with intent to deceive or mislead." 41 U.S.C. § 601(9). The government must establish this falsity and intent by a preponderance of the evidence. Commercial Contractors, Inc. v. United States, 154 F.3d 1357, 1362 (Fed.Cir.1998).

The Court of Federal Claims held that Daewoo "filed at least $50 million of the [$64 million certified] claim in bad faith" and consequently assessed a $50.6 million penalty against Daewoo under the Contract Disputes Act. Daewoo Eng'g, 73 Fed.Cl. at 597. The $50.6 million portion of the claim found to be fraudulent represented the projected costs of completion of the contract. Daewoo challenges this assessment on three theories: (1) that Daewoo's certified claim was not a "claim" for $64 million under the Contract Disputes Act; (2) even if it was a claim for that amount, it was not fraudulent; and (3) even if the claim was in part fraudulent, it was not shown to be fraudulent to the extent of $50.6 million.

A.

We first address whether the contractor claimed approximately $64 million under the Contract Disputes Act.

A "claim" under the Contract Disputes Act, 41 U.S.C. ss 601-13, must be "(1) a written demand, (2) seeking, as a matter of right, (3) the payment of money in a sum certain." Reflectone, Inc. v. Dalton, 60 F.3d 1572, 1575 (Fed.Cir.1995) (en banc) (citing FAR 33.201, 48 C.F.R. § 33.201). Daewoo urges that

the $50.6 million in future costs detailed in its certified claim were not sought as a matter of right, but instead were merely estimates provided to encourage the government to adjust the contract specifications.

Both the government and Daewoo agree that claims for future costs are permissible. Thus, the fact that not all of the costs recited in Daewoo's certified claim had been incurred does not prevent it from being construed as a claim for $64 million, including such projected costs. See UMC Electronics, 249 F.3d at 1339 (describing a claim including both incurred and projected costs). The Court of Federal Claims has noted that "a contractor may claim future expenses; however, when a contractor submits a claim that includes future expenses, projected costs should be in good faith." UMC Electronics Co. v. United States, 43 Fed.Cl. 776, 803 (1999), aff'd, 249 F.3d 1337 (Fed.Cir.2001).[1]

We think that the construction of Contracts Disputes Act claims should follow the general rules for the construction of written instruments. We note that Daewoo agrees that the claim should be construed using these general rules.

We look first to the plain language of the document, which the government urges is on its face

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[1] We have held that the Contract Disputes Act permits interest to be awarded on a contractor's projected costs before the contractor actually incurs such claimed costs. See Caldera v. J.S. Alberici Constr. Co., 153 F.3d 1381, 1382-83 (Fed.Cir.1998).

a claim for $64 million and which Daewoo equally forcefully argues is plainly a claim for only $13 million.

Some of the language in the claim document supports the government's argument that the claim was for $64 million in incurred and projected costs. The claim document's "Certification of Request For Equitable Adjustment" stated that "the amount requested accurately reflects the contract adjustment for which the Contractor believes the Government is liable." Certified Claim at 7. The claim stated that "[t]his request for equitable adjustment is separated into past and future impacts," Certified Claim at 55, and that "[Daewoo] is requesting . . . costs applied to" the period after December 2001, Certified Claim at 66. The claim then detailed these post-2001 costs, which included subtotaled costs for Daewoo and/or each of its subcontractors for equipment, overhead, profit, haul road maintenance, erosion control, escalation, vehicles, bonds, insurance, and so on. Certified Claim at 67-88. The claim stated that the "Total Costs January 1, 2002 & Forward" were $50,629,855.88 and that the "Grand Total Past and Future Costs" was $63,978,648.95. Certified Claim at 89.

On the other hand, some of the claim document's language favors Daewoo's argument that the claim was only for $13 million in incurred costs. For example, the Executive Summary of the claim document referenced only the $13 million incurred costs. Certified Claim at 8. The claim document later advised that "estimates of future cost and time impacts anticipated to be incurred . . . are provided as a guide to the Government for considering alternate

specifications." Certified Claim at 51. The Memorandum portion of the claim concluded that "Daewoo expressly reserves it[s] right to seek damages subsequently incurred." Certified Claim at 50.

We conclude that, standing alone, the claim document is unclear. Under such circumstances, its meaning is a factual question.[2] The Court of Federal Claims here made a factual finding that Daewoo made a claim for the full $64 million. That finding is not clearly erroneous.

Where the meaning of a written instrument is unclear, courts look to extrinsic evidence to resolve the question.[3] The extrinsic evidence unquestionably

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[2] See Beta Sys., Inc. v. United States, 838 F.2d 1179, 1183 (Fed.Cir.1988) ("The question of interpretation of language and conduct-the question of what is the meaning that should be given by a court to the words of a contract, is a question of fact, not a question of law." (quoting 3 Arthur Linton Corbin, Corbin on Contracts § 554 (1960))); 11 Richard A. Lord, Williston on Contracts § 30:7 (4th ed. 1999) ("Where a written contract is ambiguous, a factual question is presented as to the meaning of its provisions . . . .").

[3] See, e.g., Teg-Paradigm Envtl., Inc. v. United States, 465 F.3d 1329, 1338 (Fed.Cir.2006) ("When a provision in a contract is susceptible to more than one reasonable interpretation, it is ambiguous, and we may then resort to extrinsic evidence to resolve the ambiguity."(citations omitted)); 11 Richard A. Lord, Williston on Contracts § 30:7 (4th ed. 1999) ("Where a written contract is ambiguous . . . the fact finder must interpret the contract's terms, in light of the apparent purpose of the contract as a whole, the rules of contract construction, and extrinsic evidence of intent and meaning."(footnotes omitted)). The parties' own construction of an ambiguous written instrument is important when determining its meaning. See DDB Techs.,

supports the Court of Federal Claims' factual finding that the contractor intended to make a claim for $64 million, the full amount of the pre-2002 and post-2001 costs. In its complaint filed in the Court of Federal Claims, Daewoo stated that its March 29, 2002, claim "requested damages for the added costs incurred from October 13, 2000, through December 31, 2001, in the amount of $13,348,793.07 and for the added costs incurred and to be incurred after December 31, 2001, in the amount of $50,629,855.88, for a total monetary damage claim of $63,978,648.95." Compl. ¶ 32. At trial in February 2005, Daewoo's project manager, J.W. Kim, who had certified the claim, testified that the claim was for nearly $64 million.[4] The government itself thought Daewoo's certified claim was for $64 million, and

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L.L.C. v. MLB Advanced Media, L.P., 517 F.3d 1284, 1292 (Fed.Cir.2008); 11 Richard A. Lord, Williston on Contracts § 32:14 (4th ed. 1999) ("[T]he parties' own practical interpretation of the contract-how they actually acted, thereby giving meaning to their contract during the course of performing it-can be an important aid to the court.").

[4] Q. Mr. Kim, you certified the claim to the U.S. Government where Daewoo was asking the government to pay Daewoo over $60 million, right?

A. We-yeah, I certified over 60 million, yeah.

. . .

Q. This was not a $13 million claim and we'll submit another claim later for our future damages, right? It was a $63 million claim.

A. Yes.

Tr. 9431:9-13, 9544:1-4, Feb. 25, 2005.

after it received the certified claim in March 2002, it informed Daewoo's bonding company in June 2002 that Daewoo had filed a request for equitable adjustment with the government for $64 million.

The contrary evidence includes the testimony of J.W. Kim, who, after testifying repeatedly that he had certified the claim for $64 million, later attempted to recant and testified that he had certified only $13 million. However, the Court of Federal Claims found this revised testimony, and the related testimony of other witnesses given after J.W. Kim's attempted recantation, not to be credible. See Daewoo Eng'g, 73 Fed.Cl. at 570. We review witness credibility determinations made by the trial court under a highly deferential standard. See Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 575, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985); UMC Electronics Co., 249 F.3d at 1340. There is no basis for rejecting the Court of Federal Claims' credibility findings.

We conclude that the Court of Federal Claims did not err in concluding that Daewoo submitted a certified claim for $64 million.

B.

We next address Daewoo's theory that the Court of Federal Claims erred in finding that the $50.6 million portion of the certified claim, the amount of claimed future costs, was fraudulent and in assessing a penalty in that amount.[5]

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[5] Here the government retained Cotton & Company ("Cotton") as a certified fraud examiner. Cotton determined that certain specific items in the incurred costs portion of

The Court of Federal Claims did not find that Daewoo's theories of the government's breach of the contract-based on alleged defective specifications, failure to disclose superior knowledge, and impossibility-were fraudulent (though it ultimately found these theories to be without merit). Rather, the Court of Federal Claims found that Daewoo's $50.6 million projected cost calculation was fraudulent. That calculation assumed that the government was responsible for each day of additional performance beyond the original 1080-day contract period, without even considering whether there was any contractor-caused delay or delay for which the government was not responsible. The calculation then simply assumed that Daewoo's current daily expenditures represented costs for which the government was responsible.[6] Daewoo

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Daewoo's certified claim, including duplicate costs, overstated equipment costs, and overstated overhead rates, were fraudulent. The Court of Federal Claims agreed. See Daewoo Eng'g, 73 Fed.Cl. at 592, 596. In light of our disposition, we need not address Daewoo's challenges to these determinations.

[6] Daewoo stated that it calculated the $50.6 million in projected costs by using its own weather parameters, rather than those supplied by the government during the bidding period, to re-calculate the number of days needed to complete the contract as 2008 rather than 1080 days. Certified Claim at 32, 54. Daewoo next calculated that 153 of the additional 928 days had occurred before January 1, 2002, and that the remaining 775 were projected to occur after December 31, 2001. Id. at 66. Daewoo stated that it averaged "the last three months of costs, October, November and December 2001" and then applied that monthly average to the projected additional 25.5 months (775 days) "as an estimate for costs extending into the future." Id.

apparently used no outside experts to make its certified claim calculation, and at trial made no real effort to justify the accuracy of the claim for future costs or even to explain how it was prepared. See Daewoo Eng'g, 73 Fed.Cl. at 573, 582. Indeed, Daewoo's damages experts at trial treated the certified claim computation as essentially worthless, did not utilize it, and did not even bother to understand it. See id. at 573. The Court of Federal Claims pointed out that Daewoo's claim preparation witnesses inconsistently referred to and interchanged actual, future, estimated, calculated and planned costs. See id. at 572, 574-76. The court found that J.W. Kim, who certified the claim, gave false testimony. Id. at 569-70, 584 n.63. The court also found that the testimony of Daewoo's witness Mr. Richardson regarding the calculation of Daewoo's certified claim "left no doubt that [Daewoo's] case was unsupportable and was pursued by Daewoo with fraudulent intent." Id. at 573 n.45.

The Court of Federal Claims ultimately found that the certified claim was simply a "negotiating ploy," and that Daewoo "did not honestly believe that the Government owed it the various amounts stated when it certified the claim." Id. at 588, 590. The court concluded,

> [T]he extra $50 million claim was a means to get the Government's attention, and to show the Government what would happen if it did not approve the new compaction method that

> plaintiff wanted. Daewoo did not file that part of the claim in good faith; it was not an amount to which plaintiff honestly believed it was entitled. Whether Daewoo wanted the money or wanted the Government's attention, $64 million was not an amount the Government owed plaintiff at the time of certification, and plaintiff knew it.

Id. at 596.[7] On appeal Daewoo makes virtually no effort to show that the Court of Federal Claims' findings of fraud are clearly erroneous.

Daewoo argues, however, that the findings of the Court of Federal Claims somehow must be set aside, because the court found that the claim was fraudulent in the amount only of $50.6 million rather than $64 million. Daewoo argues that this is so because the government had attempted to prove the fraudulence of both the past and future damages "based on the same theory." Pl.-Appellant's Reply Br. at 10.

Daewoo's premise is incorrect. The Court of Federal Claims found Daewoo's entire $64 million calculation likely was fraudulent,[8] but concluded that

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[7]The Court of Federal Claims stated that "Daewoo's case against the United States is wholly without merit; its claims are fraudulent," Daewoo Eng'g, 73 Fed.Cl. at 550; "[t]he certified claim itself was false or fraudulent and plaintiff knew that it was false or fraudulent," id. at 585; "[Daewoo] did not honestly believe that the Government owed it the various amounts stated when it certified the claim," id. at 590; "[Daewoo's] claim is fraudulent," id. at 595.

[8] The Court of Federal Claims held that the government proved that Daewoo "did not believe that the Government owed

a penalty of only $50.6 million should be assessed because the remaining $13 million incurred cost claims could have been ultimately supported by alternative methodologies which, while incorrect, would not necessarily have been fraudulent. Daewoo Eng'g, 73 Fed.Cl. at 595-96. The court found that the " 'part of [the] claim' that is fraudulent without question is $50,629,855.88." Id. at 595 (alteration in original). The court's decision to award only $50.6 million as a penalty does not undermine its factual findings.

Finally, Daewoo appears to argue that a claim can be fraudulent only if it rests upon false facts rather than on a baseless calculation. We disagree. Here Daewoo certified, as required by 41 U.S.C. § 605(c)(1), that "the claim is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which the Contractor believes the Government is liable." Certified Claim at 7. By certifying a claim for damages in the amount of $64 million, Daewoo represented that the claim was made "in good faith." It is well established that a baseless certified claim is a fraudulent claim. For instance, the First Circuit has held that if a party knows that its claim that it is

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it $64 million as a matter of right" and that "Daewoo's entire $64 million claim was an attempt to defraud the United States." Daewoo Eng'g, 73 Fed.Cl. at 585. The court also stated that "[w]e suspect that Daewoo's entire claim is fraudulent." Id. at 595-96.

entitled to funds under a letter of credit "has no plausible or colorable basis," then the party's "effort to obtain the money is fraudulent." Itek Corp. v. First Nat'l Bank of Boston, 730 F.2d 19, 25 (1st Cir.1984); see also Ward Petroleum Corp. v. Fed. Deposit Ins. Corp., 903 F.2d 1297, 1301 (10th Cir.1990).

Congress specifically enacted the fraud provision of the Contract Disputes Act "out of concern that the submission of baseless claims contribute [s] to the so-called horsetrading theory where an amount beyond that which can be legitimately claimed is submitted merely as a negotiating tactic." S.Rep. No. 95-1118, at 20 (1978), as reprinted in 1978 U.S.C.C.A.N. 5235, 5254. We have noted that the "purpose of the certification requirement is to trigger[ ] a contractor's potential liability for a fraudulent claim under section 604 of the [Contract Disputes] Act." Fischbach & Moore Int'l Corp. v. Christopher, 987 F.2d 759, 763 (Fed.Cir.1993) (internal quotation marks omitted) (first alteration in original).

Daewoo also contends that the $50.6 million penalty was unconstitutional under the Eighth and Fifth Amendments. This assertion is meritless. Under the Eighth Amendment, a penalty is unconstitutional only if it is disproportionate to the possible harm resulting from the conduct. See United States v. Bajakajian, 524 U.S. 321, 334, 118 S.Ct. 2028, 141 L.Ed.2d 314 (1998) ("[A] punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense."). Here the potential harm was Daewoo's securing a $50.6 million payment from the government; under these circumstances a $50.6

million penalty is not disproportionate. The fact that the fraud may have been unlikely to succeed does not suggest that a penalty is inappropriate. The same standard and result would follow under the Fifth Amendment, if the penalty here were to be treated as equivalent to punitive damages (an issue we do not decide). See BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 581, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996) (noting that in a due process challenge to a punitive damages award, "the proper inquiry is whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred" (internal quotation marks omitted)).

II

Daewoo also argues that the $10,000 penalty under the False Claims Act was not supported.

Under the False Claims Act, "[a]ny person who . . . knowingly presents" to the government "a false or fraudulent claim for payment or approval"" is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains." 31 U.S.C. § 3729(a). "Knowingly" is defined as (1) "actual knowledge," (2) acting "in deliberate ignorance of the truth or falsity" of information, or (3) acting "in reckless disregard of the truth or falsity" of information; "no proof of specific intent to defraud is required." Id. § 3729(b). The government must establish a violation of the False Claims Act by a preponderance of the evidence. Id. § 3731(c); Commercial Contractors, 154 F.3d at 1362.

To support its conclusion that Daewoo violated the False Claims Act, the Court of Federal Claims cited the findings underlying Daewoo's liability under the Contract Disputes Act. See Daewoo Eng'g, 73 Fed.Cl. at 585.[9] A certified claim may be a source of liability under both the Contract Disputes Act and the False Claims Act. See UMC Electronics, 249 F.3d at 1339-40; Commercial Contractors, 154 F.3d at 1375. The Court of Federal Claims did not err in concluding that Daewoo violated the False Claims Act. Because the court did not find that the government incurred damages from Daewoo's false claim, the court properly assessed only the statutory penalty.

III

Finally we turn to the contractor's affirmative claims listed in its complaint.

Daewoo's complaint alleged that the government owed it money damages and an increase in the contract's performance time, due to defective specifications in the contract's weather and embankment clauses, breach of the government's duty to disclose its superior knowledge, and the impossibility of performing the contract. See Compl. ¶ ¶ 34-76.

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[9] Daewoo asserts that the Court of Federal Claims improperly applied a negligence standard when holding that Daewoo violated the False Claims Act, but in fact the court recited the correct standard and stated that "[t]he Government proved by any standard that Daewoo's $64 million claim was fraudulent." Daewoo Eng'g, 73 Fed.Cl. at 585.

Under 28 U.S.C. § 2514, "[a] claim against the United States shall be forfeited to the United States by any person who corruptly practices or attempts to practice any fraud against the United States in the proof, statement, establishment, or allowance thereof." Section 2514 further states that "[i]n such cases the United States Court of Federal Claims shall specifically find such fraud or attempt and render judgment of forfeiture." To prevail under § 2514, the government must "establish by clear and convincing evidence that the contractor knew that its submitted claims were false, and that it intended to defraud the government by submitting those claims." Commercial Contractors, 154 F.3d at 1362.

Unlike the antifraud provision of the Contract Disputes Act, 41 U.S.C. § 604, under which a contractor may incur liability only for the unsupported part of a claim, forfeiture under 28 U.S.C. § 2514 requires only part of the claim to be fraudulent. For instance, in Young-Montenay, Inc. v. United States, we held that because a contractor had submitted a claim to the government for $153,000 when the contractor knew the government was liable only for $104,000, such a knowingly false claim forfeited the contractor's later damages claim against the government under the contract. 15 F.3d 1040, 1042-43 (Fed.Cir.1994).

The Court of Federal Claims held that the government "showed by clear and convincing evidence that [Daewoo] knowingly presented a false claim with the intention of being paid for it" and thus that Daewoo's claims against the government were forfeited under § 2514. Daewoo Eng'g, 73 Fed.Cl. at 584. Daewoo itself concedes that if the $50.6 million

Contract Disputes Act penalty is correct, then the forfeiture of its $13 million is also correct. Since we have upheld the $50.6 million award, we also uphold the forfeiture under § 2514.[10]

AFFIRMED

COSTS

No costs.

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[10] In light of our disposition, we need not address the alternative holding of the Court of Federal Claims rejecting Daewoo's claims on the merits. See Commercial Contractors, 154 F.3d at 1362 (affirming the holding of the Court of Federal Claims that a contractor's claims were forfeited under § 2514 without reaching the contractor's affirmative claims). We also need not address the finding of the Court of Federal Claims that Daewoo fraudulently induced the government to award the road construction contract, since, as the court correctly concluded, fraudulent inducement in this case causes "[n]o additional monetary damages [to] apply." See Daewoo Eng'g, 73 Fed.Cl. at 588.

United States Court of Federal Claims

DAEWOO ENGINEERING AND CONSTRUCTION CO., LTD., Plaintiff,

v.

UNITED STATES OF AMERICA, Defendant.

No. 02-1914C

Oct. 13, 2006

Enver W. Painter, Jr., Honolulu, HI, for plaintiff. Robert M. Fitzgerald and Henry D. Danforth, Watt, Tieder, Hoffar & Fitzgerald, LLP, McLean, Virginia, of counsel.

Brian S. Smith, Trial Attorney, Commercial Litigation Branch, Civil Division, United State Department of Justice, Washington, D.C., for defendant.

ORDER AND OPINION

HODGES, Judge.

This case arises from a construction contract dispute between Daewoo Engineering and Construction Company and the United States Corps of Engineers. Plaintiff agreed to build a fifty-three-mile road around a tropical island in the North Pacific. The contract requires that the job be completed in 1080 days, just over three years.

Daewoo won the contract and received a notice to proceed in June 1999. The three-year construction period did not begin until October 2000 because of environmental concerns, but Daewoo could and did complete most of the preliminary work during 1999 and 2000.

Daewoo's initial bid was $73 million, which was below the Government's own estimate for the Project. The next bid from a contractor was approximately $100 million. The Government warned Daewoo that its bid seemed low and permitted it to increase the bid to $88 million. Plaintiff had no basis for justifying either the initial bid or $15 million-higher bid. Its intent was to obtain the contract, then profit through demands for equitable adjustments.

Trial of this case lasted approximately thirteen weeks, conducted over a period of more than five months. Trial included a site visit to the Republic of Palau. Palau is in the North Pacific Ocean, southeast of the Philippines. The Government filed fraud counterclaims at the close of plaintiff's case, then presented its case-in-chief. Plaintiff insisted on additional discovery and a rebuttal case, which we conducted several months later in Washington, D.C.

Daewoo's case against the United States is wholly without merit; its claims are fraudulent. The Corps of Engineers has been as conscientious, patient, and fair in its administration of this contract as Daewoo has been demanding, unreasonable, and inept. The road had not been completed in the Spring of this

year. We do not know its current status.[1]

BACKGROUND

The United States entered a "Compact of Free Association" with the Republic of Palau effective October 1, 1994. The Compact called for the Government to build a fifty-three-mile two-lane road on the island of Babeldaop within six years of its signing, by September 20, 2000. Babeldaop is the largest of approximately 300 islands making up the Republic of Palau. It will be Palau's capital when the road is completed.

The Corps of Engineers issued requests for proposals according to a two-step procurement process. The Government and the contractors who responded to the Solicitation understood that completing the job in 1080 days would be difficult, given the tropical conditions and the mountainous terrain. Soils in Palau have high moisture levels that make them difficult to compact, as the road designers and most of the bidders knew well.

Compaction prevents embankments from settling over time, or becoming unstable because of water content or air pockets. Compacting successive layers of fill is the method of constructing embankments used in most of the world's road projects. The project in Palau requires the contractor to construct embankments in layers of fill that are compacted according to industry practice. The Corps lowered

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[1] This Opinion is written in the present tense when referring to contract terms and claims because the project may not be finished. The trial ended last year.

the "density requirement" for each layer of fill to eighty-five percent because of the difficult soil content.[2] Ninety percent is the industry standard.

The Government went to generous lengths to cooperate with plaintiff and to help it perform the contract. Daewoo's first bid was $73 million. The Corps suggested that such a bid was extraordinarily low and permitted the contractor to increase its bid. The Corps agreed to time extensions for wet weather irrespective of whether plaintiff's alleged delays were on a critical path.[3] We surmised that Daewoo benefitted from its former reputation as a major international contractor,[4] and from pressures on the Corps to complete the road.

A. History

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[2] Density in this context is the proportion of compaction required for an embankment, stated as a percentage of the amount of moisture that a particular soil will hold. Compaction is the process of removing that moisture from the soil.

[3] The Weather Clause discloses criteria for judging adverse weather. One purpose of these disclosures is to avoid disputes over whether the contractor has experienced weather that warrants extensions of the contract. This contractor disputed weather-related issues on a regular basis, however. Government representatives met daily with Daewoo beginning in February 2001 to discuss whether plaintiff could work that day.

[4] Daewoo had been a major contractor with projects throughout the world, but legal and financial problems caused it to reorganize after obtaining the Palau contract. The Government issued a modification to change the name of the contractor to Daewoo Engineering and Construction Corporation. See PX 178.

The Republic of Palau comprises a very old chain of approximately 300 islands that make up an archipelago on the western edge of the Carolines. Spain claimed the area in 1885, and sold the Carolines to Germany at the end of the nineteenth century. The Japanese obtained them at Versailles after World War I. Following Japan's defeat in World War II, all of the Carolines, Marianas, and Marshall Islands became United Nations Trust Territories under administration of the United States. The United States Government helped improve Palau's infrastructure and its educational system until it became independent in October 1994.[5]

The Babeldaop Road is among the improvements the United States agreed to build pursuant to the Compact of Free Association. Babeldaop contains scattered villages, but is mostly uninhabited. Only about 20,000 people live on all the Palauan islands. Palau's current capital is Koror, but Babeldaop will be the new capital once the road is finished. The capital building on Babeldaob is partly completed; it looks very much like the United States Capitol Building in Washington, D.C. It will house the Executive, Legislative, and Judicial branches of government in Palau.

Palau is about seven degrees off the equator. The weather is usually hot and rainy there, and the humidity is high. The average annual rainfall is 150 inches. The islands do not have distinct wet and dry

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[5] The Allies had given the Republic of Palau a choice after World War II to become a protectorate of the United States or to become independent. The people of Palau chose independence.

seasons, but intermittent rainy weather with periods of sunny and windy conditions. Soils in Palau are mostly clay with a high moisture content.

The alignment or course of the Compact Road traverses jungle for most of its length. High forest canopies and thick vegetation cover the road in many places. The road passes near several small villages.

B. Administration

The Department of the Interior administers the Compact of Free Association for the United States. The Corps of Engineers has been responsible for designing the Compact Road, for bidding the contract, and for monitoring its construction. The Corps obtained contracts with four Architect and Engineering firms to complete the design. All are based in Honolulu, Hawaii. The road courses through four "Packages" or geographical areas of the Island. Each of the four firms was responsible for one Package. The four Architect and Engineering firms hired GeoLabs, a geotechnical consulting firm, to help them obtain the needed information to complete the design phase of the Compact Road. GeoLabs conducted comprehensive soil studies and compiled detailed geographical information about the Island.

The Corps issued a two-level Request for Proposals. The 1998 Solicitation advised prospective bidders that the winning contractor would be working in geographical conditions varying from tropical mountainous jungle to wetlands and offshore sites. The Corps warned of "significant problems . . . including maintenance of traffic flow during construction, environmental protection during

construction, avoidance/removal of existing ordnance, maximizing involvement by Palauan businesses and labor resources, sensitivity to local culture and traditions, [and] adherence to the performance schedule and timely completion of the contract work."

The Corps provided designs for the road with the Solicitation, and issued comprehensive geotechnical information to bidders near the end of April 1998. Material in the Solicitation package included the geotechnical reports provided by GeoLabs and other data specific to the Island. The Solicitation's first, qualifying level called for technical proposals to satisfy the Government that a particular bidder could handle the job. Defendant asked those considered technically qualified in phase one to submit price proposals in phase two. Daewoo submitted its technical proposal in June 1998.

1. Daewoo's Technical Proposal

The Corps of Engineers rated Daewoo above other bidders in various important areas, including management and personnel. Daewoo's management as proposed to the Corps "had substantial experience on similar road construction contracts." Moreover, Daewoo's proposed Deputy Project Manager and proposed Construction Manager had several years of experience with Corps of Engineers contracts and procedures, had successfully managed many different road construction projects, had managed projects with similar soil conditions, and had road construction experience in similar climatic conditions involving heavy tropical rain.

Daewoo impressed the Corps by stressing its job site organizational skills. It highlighted "the

importance of applying total project management in order to successfully complete the contract work."

Road construction experience was another key section of the technical proposal. Daewoo emphasized that it had "work[ed] with soils with high plasticity and in tropical climates with annual rain fall exceeding . . . (approximately 140 inches per year)." The contracting officer noted that "Daewoo identified several previous contracts that involved similar type road construction in climatic conditions similar to those that Daewoo was anticipating for the subject contract." He listed eight such contracts, "including major road projects in Pakistan, Nigeria, Cameroon, Ghana, Ivory Coast and Malaysia."

Regarding facilities and equipment, "Daewoo stressed that it owned over 6500 pieces of heavy construction equipment," and it was "considering the possibility of using 2-3 construction shifts per day so that it could reduce the number of pieces of heavy equipment required to complete the work." Daewoo "indicated that it would perform the site clearance work and the earthwork itself-proposing to subcontract only some initial work and small sections of site work and earthwork to SOCIO Micronesia."[6] Plaintiffs promised personal attention to construction of the earthwork was especially important to the Government.

Plaintiff presented a pre-award proposal that seemed to be everything the Corps wanted. Because

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[6] Testimony and other evidence at trial showed that Daewoo almost certainly knew this representation to be untrue.

of these representations, the Corps gave Daewoo the highest technical score of all bidders. After having arbitrarily increased its bid by approximately $15 million, Daewoo's price still was at least $26 million less than the next bid.

2. Daewoo's Price Proposal

Daewoo's initial bid was $73 million, well below the Government's own estimate for the Project. The next bid was approximately $100 million. The contracting officer notified six offerors in December 1998 that they were in the competitive range for discussions and gave each offeror a list of written discussion questions.

Defendant was concerned about Daewoo's unusually low bid. The Corps' office in Honolulu issued this appraisal of Daewoo from the Source Evaluation Board:

> The [Source Evaluation Board] has little doubt as to Daewoo's ability to perform this project. Because the price proposal is significantly lower compared to the [government estimate] and the other proposals, the materials quantities in the proposal breakdown were reviewed for errors or omissions. No significant omissions or quantity discrepancies have been noted by the SEB. However, discussions will be required to determine if there are approach and assumptions in accomplishing all the required work at the price proposed. Daewoo also received DCAA's high rating in financial capability to complete this project. Based on best value analysis, the SEB recommends

> that Daewoo be included in the competitive range.

See PX 86 (Price Objective Memorandum).

The contracting officer's discussion letter to Daewoo noted that its proposed price "appeared low in nearly every area . . . ." The contracting officer was concerned about plaintiff's earthwork bid:

> Price appears low. Verify quantities shown in your proposal and provide detailed description and breakdown for clear and grub, excavation, and embankment and fill line items and provide methodology assumed for construction (e.g., source of material, crew compensation, labor rates, and productivity), used to development unit prices in your proposal.

The contracting officer also asked Daewoo to "provide a rough schedule and narrative, which depicts and explains how you will complete the entire construction phase of the project in 1080 calendar days after award of the contract."

Daewoo responded by acknowledging that it had been "overly optimistic" in estimating productivity. "[I]n reality [it] cannot be achieved due to the amount of time required for drying/aerating, the cohesive soils, settlement criteria for embankment construction, and the constant threat of rainfall virtually every month of the year." Plaintiff reported that its productivity figures for the earthwork had been "considerably reduced," and that it would work double shifts: "[T]wo shifts will be operated and each shift will have 10 work hours for day and night."

Daewoo's schedule and narrative included a

"Preliminary Work Program" showing how it intended to complete the work within 1080 calendar days. Daewoo would not perform earthwork "during June, July, August and September of any year."

Daewoo's narrative stated that its work will start from the fourth month and will continue for 29 months . . . . The earthwork for soft soil areas and causeways will be teamed up separately and independently from the main earthwork teams. Where possible, work will be phased so that the rainy season will be used as the waiting period for settlement of the multi-stage embankment areas.

Daewoo increased its bid to $88,600,000 in January 1999. Its new proposal included this comment: "We have reviewed in detail[ ] all conditions in relation to the estimation in the course of clarifying the specific discussion items addressed by you and these have been fully reflected in our final proposal revision." The "discussion items" to which plaintiff referred included Post-Closing Amendments regarding earthwork specifications and compaction standards. They also included the difficulties and concerns raised by other bidders regarding compaction in rainy weather. Daewoo emphasized,

> [p]articular attention has been paid to the weather delay aspects together with all environmental concerns and requirements as detailed by the contract specifications and full cognizance has been taken into account in the revised pricing. It is emphasized that Daewoo recognizes and fully understands the importance to the COE of completing the project within the specified time period and will take all measures necessary to ensure

that this requirement is accomplished to the satisfaction of the COE.

The Corps conducted discussions with six qualified bidders in the competitive range.[7] Two offerors made no changes in their proposed prices. Three offerors decreased their proposed prices. Daewoo increased its proposed price by approximately $15,500,000 and won the contract. This was a demanding and complex road construction job on a tropical island in the Pacific, where climate and time constraints would create serious obstacles for any contractor. Daewoo's bid was sufficiently low to win the contract but apparently not high enough to interest plaintiff in doing a good job, on time.

C. Award

The Corps of Engineers approved its Price Negotiation Memorandum on February 8, 1999.[8] The

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[7] "Discussions" in government contracting parlance are the agencies' exchanges with offerors after having established the competitive range. See generally48 C.F.R. 15.306(d). They are negotiations with finalists in the procurement process undertaken to allow offerors to revise their proposals. Id.

[8] See 48 C.F.R. 15.406-3. The Price Negotiation Memorandum documents discussions with contractors in the competitive range. It may include the following:

(1) The purpose of the negotiation.

(2) A description of the acquisition, including appropriate identifying numbers.

. . .

(3) The name, position, and organization of each person representing the contractor and the Government in the negotiation.

Government recommended award of the contract to Daewoo on March 30:

> Recommendation for Award. Source Evaluation Board recommended award to Daewoo based on best value. Daewoo met all of the RFP requirements, received the highest technical score for its technical proposal, and also provided the lowest price proposal. Daewoo has provided adequate information and has explained the approach and methodology used in the development of their price proposal, which indicates they understand the scope of the project. Daewoo has also provided rates that were utilized in their price proposal which explains the difference in price between their price proposal and the Government Estimate. Analysis indicates that Daewoo [understands] the Scope of Work, and an approach/methodology to complete the

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. . .

(6) If cost or pricing data were required, the extent to which the contracting officer-

(i) Relied on the cost or pricing data submitted and used them in negotiating the price;

(ii) Recognized as inaccurate, incomplete, or noncurrent any cost or pricing data submitted; the action taken by the contracting officer and the contractor as a result; and the effect of the defective data on the price negotiated;

. . .

(11) Documentation of fair and reasonable pricing.

> project. Based on unit prices, approach/methodology, and understanding of the scope of work conveyed by Daewoo during negotiations, the SEB considers Daewoo's price proposal to be reasonable and realistic.

The Corps of Engineers was "excited" that plaintiff won the contract. An official in the Corps testified, it "rarely happens" that the Government gets the most qualified contractor for the lowest bid. Unfortunately, Daewoo merely bid what it thought necessary to obtain contract award then arrived unprepared for a project that required maximum commitment and expertise. [9]

THE PROJECT

The Corps of Engineers issued a Partial Notice to Proceed in June 1999. The Government advised Daewoo that it could not begin dredging operations as planned because of environmental concerns. Daewoo complained that it could not proceed with most of construction unless it could dredge. The Corps worked with the Environmental Protection Agency to revise permitting requirements. Daewoo received a Full Notice to Proceed on November 1, 1999. This allowed Daewoo to begin all work except coral dredging. Defendant lifted the coral dredging restriction five months later, in April 2000.

The parties negotiated a contract modification

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[9] This was a major disappointment for government officials. The Corps' administrative contracting officer commented that Daewoo arrived on site "entirely unprepared for the job at hand." [Morrison, Tr. February 16, 2005].

that paid Daewoo $12.3 million and extended the contract 347 calendar days because of the coral dredging issue. Daewoo had mobilized its operations well before April 2000 when the Government lifted dredging prohibitions. It had built barracks and site offices by then and placed earthmoving equipment and operators on the construction site. Engineers, superintendents, and other management personnel were present and ready. Daewoo was ahead of schedule by the time it received the notices to proceed because in 1999 and early 2000 because the 1080-day period of contract performance did not begin until October 13, 2000. It had completed clearing and grubbing the entire project and the Government had issued approvals to begin the crucial embankment construction.[10]

Daewoo began its earthwork on a test section in Package B in June 2000. It experienced difficulties achieving sufficient compaction almost immediately. Testing continued for two months, through mid-August. The Government expressed concern to Daewoo about its proposed equipment, construction methods, and lack of progress. Its July 3, 2000-letter[11] summarized the then-current situation:

> As you know, work here has been going for a number of weeks.

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[10] Plaintiff could begin earthwork in June and July 2000 for Package B and Package D, September 2000 for Package A, and August 2001 for Package C.

[11] The Corps gave advice and made suggestions freely, but always left "means and methods" to the contractor.

While rain contributed to the difficulty in achieving the required degree of soils compaction, I believe that there are other contributing factors as well. These include your laboratory testing method or determine maximum dry density of the soil and the equipment you are using on the test section.

Laboratory maximum dry density of soils may be determined using either "dry to wet" or "wet to dry" methods. For this project, "wet to dry" method is preferred when it corresponds to field conditions where you are drying soils prior to compaction. For the fine grained soils encountered in the field I would expect the "wet to dry" method to result in a lower maximum density and hence require less compaction effort to meet the contractually required minimum dry density. This should of course be verified by your own laboratory testing.

In addition, contract specifications 02225 states in part that each layer shall be "plowed, disked, or otherwise broken up; moistened or aerated as necessary . . . thoroughly mixed . . . and compacted." While the means and methods for achieving the required degree of compaction are up to you as the Contractor, I note that you are not using plows or disks. Your method of using ripper teeth on a motor grader to break up the soil may not be as efficient as other methods for scarifying lift surfaces or aerating and mixing the fine grained soils encountered so far to rid it of excess moisture.

> Excess moisture can make achieving the required degree of compaction difficult.
>
> Please review your laboratory and field construction methods and consider whether or not different procedures would make meeting your contract requirements easier and more efficient.
>
> While, as previously stated, the means and methods for achieving contract requirements are your responsibility, my staff and I are always available to discuss varies types of equipment and procedures if you wish.

Letter from the administrative contracting officer to Daewoo (July 3, 2000).

The Corps remained worried about Daewoo's progress in late August 2000. The administrative contracting officer wrote: "We are concerned with the difficulty Daewoo is having in achieving moisture reduction in the test sections based on your equipment, practices, procedures, [and] methods . . . ."

Daewoo worked on the test section for another month. It hoped to show that its equipment and its construction methods would create a satisfactory product. Daewoo sent a letter to Mr. Morrison on August 15, 2000. The letter included four daily reports for the test section in package B. The letter stated, "[e]ven though it rained during those four days, the existing soil could be compacted to the specified 85%, with the equipment and methods being employed by Daewoo." Mr. Morrison, the administrative contracting officer, accepted this representation and allowed Daewoo to continue on

August 16, 2000.

Daewoo became concerned thereafter whether it could achieve that level of compaction regularly, however. It wrote the administrative contracting officer to suggest that the Corps ease the standards. The letter includes the following:

> We are concerned with the difficulty experienced in achieving the required compaction. The weather during the test section process was somewhat variable, but there were periods of good weather when we would expect to be able to achieve passing results with less effort than we expended. The required compaction was only achieved after sixteen passes with a 10.5 ton vibratory roller. This is double the effort we had anticipated. We shall continue to try additional methods to improve progress.

Letter from Daewoo to Mr. Morrison (Aug. 17, 2000) (emphasis added). This letter shows Daewoo understood it was operating under a performance specification, not a design specification. Also, plaintiff conceded by this letter that it could complete the project successfully with sufficient effort. The job was not "impossible," but depended on proper allocation of resources. Plaintiff stated that it could not "achieve passing results" with the level of effort that it anticipated, even during "periods of good weather . . . . The required compaction was only achieved after sixteen passes with a 10.5 ton vibratory roller. This is double the effort we had anticipated." This shows that plaintiff misjudged its needs irrespective of the weather conditions.

We agree with the contracting officer that plaintiff "diverted resources toward examining potential methods that might improve its productivity and Daewoo continued to blame the lack of progress on the in situ moisture and the contract-specified requirements." See Contracting Officer's Decision p. 43 ("Instead of concentrating on accomplishing the contract work, Daewoo has continuously diverted its scarce and valuable resources to construction of experimental fills and other non-productive activities.").

Daewoo sent a letter September 6, proposing another test section using additional equipment. It informed the Government:

> We have attached for your information the technical proposal from Daebon Engineering. We are now proceeding with this study and will inform you of the results as they become available. We are highly concerned with the lack of progress due to the difficulty in controlling the moisture of the soil and believe the above actions are positive steps toward increasing productivity.

A. The Daebon Engineering Report

Daewoo sought additional geotechnical studies of the area from an engineering firm called Daebon, which devised a technical proposal to help plaintiff with its compaction problems. Daewoo presented a series of changes in the contract specifications based on Daebon's study. The study focused on problems that plaintiff was experiencing with Palauan soils and particularly with embankment construction. The Corps responded to Daewoo's concerns in an

October 2000 letter, as follows:

> Review of the data you have provided indicates that the soils you are encountering do not differ significantly from those indicated in the contract, including the project Geotechnical report. The Daebon plan focuses attention on the possible presence of the mineral haloysite. Haloysite is one of the most common mineral components of residual soils, particularly those derived from volcanic parent material. I do not believe the presence is unusual or differs materially from what is ordinarily encountered here. The nature of the local soils was considered in setting the relatively low degree of soils compaction specified.
>
> I concur that progress in completing test sections in the field has been slow. It appears that this is primarily related to drying the soil to a moisture content which will allow compaction, not to your ability to actually compact the soil once an appropriate moisture content is achieved. I believe this is supported by your test results and continuing efforts to demonstrate you can successfully compact, to required densities, loose lifts of soil thicker than specified in the contract documents. My staff and I will continue to work with you in this regard.

Letter from the Corps of Engineers to Daewoo (Oct. 17, 2000).

The Corps reminded plaintiff repeatedly that "the means and methods to achieve the required

compaction are your responsibility." Still, the administrative contracting officer found it necessary to write again to express concern about plaintiff's lack of earthwork progress in Package B:

> I request that you review my past serial letter regarding your progress and work procedures for earthwork activities and package B. . . . You have spent the last seven and half months in this area with little to no satisfactory progress or improvement. While I agree that the rain has contributed to the difficulties you have encountered, other factors within your control have also added to your problems. Specifically, I am concerned that your efforts to date have been inconsistent and your inability to prepare and follow a plan is detrimental to progress. It appears that you continue your efforts on avoiding the specification requirements. For example, since September, you have attempted to place thicker lifts in "undocumented fill sections" against my recommendation, and failed to achieve progress. I know that only last week you have again changed your plans and have discontinued your efforts to place thicker lifts. Your actions are impacting your ability to complete the project within a reasonable time period. I request that you prepare a written test section work procedure that you fully intend to follow.

Letter from Mr. Morrison to Daewoo (Dec. 28, 2000).

Daewoo disagreed in practically every respect with the Corps' concerns. It wrote in January 2001:

> [We] disagree with your statement that our actions are impacting our ability to complete the project within a reasonable time. We believe you're not taking sufficient account of the poor weather coupled with difficult soil conditions. Our opinion is that we have made and continue to make all reasonable efforts toward progress.

The Government received Daebon's complete report on April 9, 2001. The report recommended modifications to the contract specifications, including a suggestion that the Corps reduce the compaction requirement from eighty-five percent to eighty percent. The contracting officer complied with this suggestion in part. He agreed to lower the compaction rate to eighty percent for the top ten meters of most embankments. Defendant stated in a June 5, 2001 letter that its "acceptance of this alternative criteria is solely for the purpose of allowing increased productivity on your part. It does not imply or acknowledge an error in the existing contract requirement." The Corps did not issue a deductive change order for the lower compaction requirement.

Daewoo continued to have problems constructing embankments despite such accommodations, and it explored additional alternatives with consultants. One such alternative method was the use of geogrid materials.[12] The Government agreed in October 2001

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[12] The geogrid materials proposed by Daewoo were not discussed in great detail, but their purpose is to enable construction of stable embankments in difficult conditions at a

to pay for geogrid materials that plaintiff would use on a test section. The geogrid materials were part of a method that became known during trial as Traffic Fill Compaction or TCRF.

Meanwhile, the Corps was conducting its own investigation of alternative embankment construction methods. The Army Engineering Research and Development Center in Vicksburg, Mississippi, sent Ron Wahl and Reed Freeman to Palau to investigate the contract's required methods and to suggest possible alternatives.

B. The ERDA Report

Mr. Wahl and Mr. Freeman were in Palau for seven working days. They reported that reducing moisture content to a level that permitted adequate compaction of Palauan soils would be difficult. Contributing factors were high in situ soil moisture content, frequent short-duration rainfall, high humidity, and dense jungle foliage that blocked wind in low-lying areas. The Government had reported these problems in the bidding materials and elsewhere in detail; they were well known to all parties.[13]

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lower cost than methods traditionally used, such as those specified in plaintiff's contract with the Government. Essentially, geogrids are man-made materials that are used to reinforce sloped embankments.

[13] Plaintiff noted during trial that Wahl and Freeman did not mention plaintiff's management problems or its lack of equipment or manpower as contributing factors, apparently assuming this meant the Government did not see those factors as problems related to Daewoo's shortcomings. We did not

The ERDA Report recommended testing the geogrid method, though not necessarily implementing it. The Corps permitted the testing. ERDA recommended reducing the compaction requirement to seventy percent on embankments of less than ten meters. The Government reduced compaction requirements to eighty percent on embankments of less than ten meters and eighty-five percent overall.[14] The ERDA Report and the Corps' response show that the Government tried to cooperate with Daewoo. It considered suggestions that could help complete the job.

The Government permitted plaintiff to construct and compact embankments using lesser-and cheaper-standards than those required by the contract. The Corps considered suggestions from both the Daebon and the ERDA reports, including testing the TCRF method described above. Unfortunately, defendant's concessions on the compaction rate had a perverse effect on some witnesses. They testified, for example, that efforts by the Government to improve plaintiff's productivity resulted in Daewoo's having underestimated the project's overall difficulty.[15]

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assign significance to these points, however, because it was clear that ERDA's purpose was not to assign blame but to assist the parties by making technical suggestions for improvement.

[14] Daewoo bid on and won a contract that required ninety percent compaction without exception-not seventy percent or even eighty percent.

[15] Plaintiff's contention that the Corps somehow misled the contractor or disadvantaged it by reducing the compaction requirement is typical of Daewoo's approach to trying this case. Such examples show plaintiff's willingness to elicit questionable

Plaintiff's attorneys also attempted to take advantage of the Government's cooperation. They argued that the Corps reduced its requirements because the original requirements were "impossible" or "defective." These witnesses and attorneys were willing to offer such testimony and make such arguments despite contrary evidence in their own case. For example, a letter from Daewoo to Mr. Morrison dated August 15, 2000, enclosed four daily reports for the first test section, in package B. The letter stated, "[e]ven though it rained during those four days, the existing soil could be compacted to the specified 85%, with the equipment and methods being employed by Daewoo."

Defendant and plaintiff exchanged a series of letters regarding Daewoo's request that the Government approve thicker fill lifts. The Corps ultimately denied this further easing of contract specifications "based on the extent of non-compliance with the contract specifications by your subcontractor, the failure of Daewoo to properly plan, manage and control the quality of its earthmoving and the added risk associated with higher lift thickness."

Daewoo sent a letter in October 2000, asking for "blanket approval" to expand work hours and days worked during the week, which the Corps approved. Plaintiff did not say it would work ten-hour shifts to finish the earthwork and the paving as it promised

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testimony, apparently to bolster a weak case that Daewoo should not have pursued in this court.

before contract award. It has not worked the ten-hour shifts to date, so far as we know.

Plaintiff did little to help itself construct embankments according to contract specifications. Daewoo did not try scrapers to help compact the fill, which is a standard technique. With one notable exception, it did not lay tarps over embankments to keep the rain off. The single exception was in Package B, where plaintiff's use of tarps enabled it to run successful tests. These tests the results reported in a August 15, 2000 letter stating that despite four days of rain, "the existing soil could be compacted to the specified 85%, with the equipment and methods being employed by Daewoo."

Plaintiff's counsel argued after trial that tarps did not work in the test section, but testimony during trial established clearly that they did. Tarps were among the most successful of the methods available to plaintiff. Counsel stated that tarps would work only if someone were there to take the tarps off immediately when the rain stopped and replace them when the rain began again. This seemed like a reasonable procedure, particularly compared with the "exotic methods" that plaintiff attempted during construction. Daewoo tried "cooking the soil" with a flamethrower of sorts, for example, and constructing tents over embankments to keep them dry.

C. Pre-Claim Activity

Plaintiff sent a letter to the Corps of Engineers in November 2001, requesting, for the first time, information about weather delay days in the contract. Daewoo wanted to know the Government's criteria for calculating adverse weather for purposes of SCC-

1.[16] This should have been a high priority before bidding.

It turned out to be a claim-making exercise initiated by Mr. Cowan. His purpose was not assist Daewoo in planning the job or assembling its bid. He hoped to use it to support claims for differing site conditions and defective specifications that he planned to file against the Government.[17] Plaintiff's claim-related inquiries along with the Government's January 14, 2002 responses were:

> 1. Referencing Specification Section 00800, Special Contract Requirements, Clause 1, Time Extension for Unusually Severe Weather, how were the Monthly Adverse Weather Days determined?
>
> Monthly adverse weather days were determined by using historical rainfall data for Koror. A rain event that was 0.5 inches or greater was considered a weather day.

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[16] These inquiries coincided with a visit from Mr. Cowan of corporate headquarters in Korea. He testified repeatedly that he was there to "review the situation." His purpose however was to take charge of compiling claims against the Government.

[17] The differing site condition claim did not arise during trial. Such a claim would not have been valid because the Government provided detailed information about the islands of Palau, the nature of the soils and their moisture levels, and how the soils were distributed. Case law has established that weather conditions or other acts of God cannot be the basis of a differing site condition claim. Turnkey Enters., Inc. v. United States, 220 Ct.Cl. 179, 597 F.2d 750, 754 (1979); Hardeman-Monier-Hutcherson v. United States, 198 Ct.Cl. 472, 458 F.2d 1364, 1370-71 (1972).

Additional weather days were given during the typhoon season. The number of days were adjusted for a 6 day workweek.

2. If historical rainfall data was used to determine the number of adverse weather days per month, what historical data was used?

As noted above the rainfall data was for Koror.

3. Did the Government anticipate the critical path for the project to be embankment work to include processing of excavated materials to reduce moisture content of soils prior to compaction?

The Government did not anticipate a critical path. The methodology for project construction and sequencing of work is the total responsibility of the Contractor.

4. If the answer to 3 above is yes, what percentage moisture reduction was anticipated?

N/A

5. Did determination of adverse weather days include time for embankment surfaces to become trafficable after a rainfall? We note the contract allows days impacted by adverse weather in addition to the actual rainfall event . . .

The determination of weather days was based on historical rainfall data and was not based on the type of construction contract. The consideration for drying time was not included in the weather day calculation.

> Days in excess of those anticipated are given to the Contractor through contract modification based on the impact of activities located on the project critical path.

Plaintiff submitted a Request for Equitable Adjustment to the Government on March 29, 2002. It alleged that SCC-1 was defective because the Corps did not base the form on relevant and available data. Plaintiff claimed that the Government violated its own regulation in compiling the Clause. See ER 415-1-15. This, according to plaintiff, resulted in a "gross misrepresentation" of the adverse weather delays anticipated during contract performance.[18] It alleged that the contract-provided method for embankment construction was defective as well, and the work was impossible to achieve within the time for performance.

Daewoo's certified claim sought a total of $64 million in equitable adjustments. It demanded $13.4 million in "incurred damages" as of December 31, 2001, and projected additional costs of $50 million not yet incurred.[19] Plaintiff's complaint incorporated

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[18] Plaintiff also accused the Government of withholding superior knowledge by failing to disclose its definition of an adverse weather day as a day when it rained in excess of 0.5 inches and that it did not include "dry-out days." The next section discusses these issues.

[19] As discussed elsewhere, the total amount of the claim has been a moving target. Page 9, ¶ 32 of the Complaint recites the damages included in its March 29, 2002 claim to the contracting officer "wherein it requested damages for the added costs incurred from October 13, 2000 through December 31, 2001, in the amount of $13,348,793.07 and for the added costs

the certified claim and also included a total of nearly $64 million in the prayer for relief.[20]

The Government sent Daewoo a proposed contract modification on April 8, 2002. The modification granted Daewoo a 125-day no-cost time extension because of unusually severe weather during the 2001 calendar year. The extension added 125 days to the ninety adverse weather delay days included in SCC-1. Plaintiff refused to sign the proposed contract modification. The Government extended the contract period unilaterally on April 17, 2002. The contracting officer later rescinded that extension, and issued a final decision denying plaintiff's claims on August 14, 2002.

Daewoo filed a complaint in this court on December 19, 2002. Plaintiff's complaint seeks damages for various claims totaling $63.9 million. The claims included defective specifications, superior knowledge, and impossibility of performance.[21]

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incurred and to be incurred after December 31, 2001, in the amount of $50,629,855.88, for a total monetary damage claim of $63,798,648.95. Daewoo's Claim included a request for an additional 928 calendar days to complete the contract work resulting from delays beyond Daewoo's control and without its fault or negligence."(emphasis added).

[20] The total claim submitted was not an approximation, but an authoritative $63,978,648.95.

[21] Plaintiff's complaint states at page 6, ¶ 20 that "Daewoo's [September 6, 2000] letter [to the Corps] provided a Technical Proposal from Daebon Engineering, a geotechnical engineering firm, regarding Daewoo's intention to conduct detailed soils analyses in an effort to better understand the difficulties in making progress." This is the sort of expert assistance that

PLAINTIFF'S CLAIMS

The Government's designs for the Compact Road contained two provisions central to the disputes here. These were the Earthwork Specifications for Construction of Embankments and the Corps' standard Weather Clause described above. The Corps of Engineers uses the Adverse Weather Clause for most construction projects. See, e.g., DFK Enters., Inc. v. United States, 45 Fed.Cl. 280 (1999) (interpreting a similar or identical weather clause). A discussion of plaintiff's case against the Government must begin with the Weather Clause.[22]

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plaintiff should have commissioned pre-bid, as some of the other contractors did. See e.g., infra, Mr. Djou.

[22] "Special Contracts Requirements Clause 1, Time Extensions for Unusually Severe Weather," is referred to throughout the case as SCC-1. Post-Closing Amendment 002 changed the original contract version of SCC-1 from sixty-one anticipated adverse weather delay days to a total of ninety days per year. The Weather Clause provides:

> (a) In order for the Contracting Officer to award a time extension under this clause, the following conditions must be satisfied:
>
> (1) The weather experienced at the project site during the contract period must be found to be unusually severe, that is, more severe than the adverse weather anticipated for the project location during any given month.
>
> (2) The unusually severe weather must actually cause a delay to the completion of the project. The delay must be beyond the control and without the fault or negligence of the Contractor.
>
> (b) The following schedule of monthly anticipated adverse weather delays is based on National Oceanic

A. The Weather Clause

The importance of the Corps' standard weather clause to plaintiff's case can hardly be overstated. Weather is the central issue in plaintiff's claim, yet it remains difficult to understand if one assumes good faith on Daewoo's part. Virtually every plaintiff's witness asserted that the Weather Clause misled Daewoo by suggesting that rainfall might not be the problem that plaintiff knew or should have known it would be.

Plaintiff's reliance on the Weather Clause throughout the trial and during most legal arguments was puzzling. Daewoo's complaint includes the following allegation: "As a result of the Corps' failure to follow the guidelines in COE Reg 415-1-15 . . . the estimate of the adverse weather delay days as set forth in Special Contract

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and Atmospheric Administration (NOAA) or similar data for the project location and will constitute the base line for monthly weather time evaluations. The Contractor's progress schedule must reflect those anticipated adverse weather delays in all weather dependent activities.

Monthly Anticipated Adverse Weather Delay Work Days Based on 6 Day Work Week:

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug
6	5	3	5	8	10	10	10

Sep	Oct	Nov	Dec
12	7	8	6

(c) Actual adverse weather day delays must prevent work on critical path activities for 50 percent or more of the Contractor's scheduled work day.

Requirements, Clause 1 is inaccurate and misleading and resulted in an unreasonable and artificially shortened contract performance period." Compl. ¶ 39, p. 11.

The purpose of the Weather Clause was to disclose in advance the parties' exposure for excess adverse weather days during contract performance. The Clause did not and could not predict future weather patterns. The Weather Clause was not misleading given the facts of this case, but if it were, we established that plaintiff did not rely solely on SCC-1 for its weather information, if at all. Daewoo conducted its own investigation of pertinent weather data and arrived at roughly the same number of adverse weather days as did the Government.

A contractor cannot claim to have been misled by such a provision as the Weather Clause, even if it were incorrect, after it has tested and verified the representation made by the Government. T.F. Scholes, Inc. v. United States, 174 Ct.Cl. 1215, 357 F.2d 963 (1966). Daewoo damaged its case by obvious efforts to coach and lead the witnesses, nearly all of whom testified that Daewoo relied solely on the Weather Clause in planning the project. Daewoo was or had been a sophisticated company that was capable of calculating its own delay analyses. The witnesses' assertions on behalf of Daewoo cast doubt on their credibility.[23] The evasive

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[23] Even the subcontractors that testified were called upon to support Daewoo's theory of the case. Evidently they were told to testify that they relied on Weather Clause almost exclusively. Supposedly they relied on the Clause to formulate their bids to

manner of Daewoo witnesses, particularly Mr. Song and Mr. Cowan, also led to credibility issues regarding plaintiff's reliance on the weather clause.

Plaintiff claims that SCC-1 is a defective specification because the Government did not follow its internal guidelines when formulating the Weather Clause. See ER-415-1-15. It maintains that Mr. Furukawa, a government employee who prepared the Weather Clause for the Corps of Engineers, had no experience in generating anticipated weather days. Plaintiff claims that Furukawa did not obtain actual weather data from the weather station in Palau, but relied on in-house compilations.

Daewoo contends that Furukawa's choice of 0.5 inches of rain to denote an adverse weather day was arbitrary, and he did not include days for typhoons until after the Corps sent bid solicitations to prospective contractors. Another Weather Clause issue is whether SCC-1 is defective because the number of anticipated adverse weather delay days did not include dry-out days.[24] Daewoo argues that the Weather Clause caused it to be unaware that construction of the Palau Compact Road within the performance period allocated by the contract was not practical.

The Government complied with ER-415-1-15.[25]

Daewoo. Most of the subcontractors had not read the Weather Clause before Daewoo submitted its claim.

[24] Delays can occur during dry-out days due to adverse weather conditions, irrespective of whether it rained on such days.

[25] We could not determine that plaintiff relied on the

Leonard Furukawa was the Corps employee who developed the anticipated adverse weather delay days for SCC-1. Mr. Furukawa has a Bachelor of Science in Geoscience. He had prepared weather clauses using pre-developed numbers of adverse weather delay days for projects in Hawaii, but he had not developed a weather clause like SCC-1. SCC-1 called for him to decide appropriate weather parameters and apply numerical values to those parameters.

Plaintiff maintains that Furukawa should have considered the effect of humidity on the project, apparently to make this case seem more like DFK. See DFK v. United States, 45 Fed.Cl. 280 (1999). The Government pointed out that Furukawa considered only weather factors that could impede all construction activity, such as rain and cyclones. Humidity could not do that. It was reasonable for Mr. Furukawa to determine that rain and cyclonic events could affect construction activity but that humidity could not.

Mr. Furukawa referenced summaries of weather data maintained and generated by the Corps' in-house planning department and NOAA weather data. ER 415-1-15 does not require that the Corps consider "all relevant available information" in compiling the number of days per month to be set forth in the Weather Clause. It states only that the adverse weather compilation should include an analysis of

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regulation in formulating its bid, or that it was even aware of such a regulation.

"NOAA or other weather data." Furukawa decided that 0.5 inches of rainfall was the correct numerical value for defining an adverse weather day caused by rainfall. The weather data he reviewed listed rainfall in increments of one inch and 0.5 inches per day. He testified that he chose 0.5 inch or more per day as the criterion for determining adverse weather days because it was "conservative."[26] Furukawa's decision complied with ER 415-1-15, which does not specify a numerical value for the rainfall parameter. No government policy or regulation defines a "correct" numerical value. Mr. Furukawa's calculations turned out to be very close to Daewoo's own calculations.[27]

Mr. Furukawa did not develop a baseline

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[26] Plaintiff seemed blind to the true purpose of the adverse weather clause, which was to provide the contractor no-cost time extensions as appropriate. The Corps' parameters presented extensions to the contractor on days that it rained only one-half inch rather than one inch. Daewoo was interested only in creating a claim from the Weather Clause.

[27] Plaintiff would not present its own weather calculations in discovery or during trial. We have not drawn adverse inferences pursuant to the spoliation doctrine because such inferences would be superfluous given the facts of this case. However, plaintiff must have had strong reasons to withhold or destroy such evidence. We considered a separate hearing to inquiring of plaintiff's witnesses whether Daewoo used the same or similar weather criteria in its study, given that it arrived at roughly the same expectations regarding weather as did the Corps. Such findings would have raised serious issues implicating Rule 11 and would have created solid evidence of fraud. A separate hearing for that purpose did not seem prudent at the time, however.

schedule or prepare a preliminary project schedule as provided in the regulation because the Corps of Engineers had prepared those schedules. He followed the guidelines set forth in ER 415-1-15 when developing the weather clause regardless of whether he referenced the regulation. If the Weather Clause could be considered a contract specification, it would not be defective for lack of compliance with internal guidelines found in ER-415-1-15.

Daewoo argues that the Weather Clause is defective because it was an affirmative representation by the Government of anticipated delays due to adverse weather. SCC-1 does not create an implied warranty of future weather. See Turnkey Enters., Inc., 597 F.2d at 754. Its purpose is to provide a contractual baseline against which to measure the contractor's entitlement to no-cost time extensions. Carman v. United States, 143 Ct.Cl. 747, 752, 166 F.Supp. 759 (1958). The weather days shown in SCC-1 were based on past weather conditions. See, e.g., DFK, 45 Fed.Cl. at 288 (holding Government's weather delay days were only "an affirmative representation as to past weather conditions"). Daewoo had "no right to assume that the actual weather in the future would correspond to the data on the chart . . . ." Id. at 287. Plaintiff was entitled only to "assume that the chart was actually based on the relevant prior weather data." Id. The chart was in fact calculated properly, and it was based on "relevant prior weather data." Id.

The contracting officer pointed out in his decision denying the claim that the Weather Clause "was never intended to represent the number of anticipated adverse weather days that the contractor

would actually encounter during performance of the contract work." This assessment seemed obviously correct during trial, but plaintiff continues to view the Weather Clause as defective, and retains it as the heart of its case.[28]

Money damages are not available for weather delays. Non-compensated extensions of time to complete the contract resolve unexpectedly harsh weather conditions. Daewoo built its case on the Weather Clause and every witness evidently was instructed to comment on it. Its insistence on an illogical argument, however, was damaging to plaintiff's case.

B. Superior Knowledge

Counts II and III of the complaint allege superior knowledge, which is another weather-related claim

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[28] Daewoo probably meant to claim misrepresentation rather than defective specification with regard to the Weather Clause. See, e.g., DFK, 45 Fed.Cl. at 288. We have jurisdiction over misrepresentation, a tort, in these circumstances, see, e.g., Summit Timber Co. v. United States, 230 Ct.Cl. 434, 440-41, 677 F.2d 852 (1982) (asserting jurisdiction over a case alleging factual misrepresentations). This Opinion does not include a full discussion of the issue. Plaintiff clearly has not proven damages caused by misrepresentation, if that was its intent. As we noted, Daewoo tested and verified the number of anticipated delay days depicted in SCC-1. Whether Daewoo called this a misrepresentation claim or a defective specification, it has not shown that SCC-1 was inaccurate or that it reasonably relied on the Clause. See T.F. Scholes, Inc., 174 Ct.Cl. 1215, 357 F.2d 963. If everything plaintiff alleged about the Weather Clause were true, it has not shown damages from relying upon government representations.

with an unlikely application to the facts of this case.[29] Plaintiff contends in Count II that defendant did not inform bidders that Mr. Furukawa computed the adverse weather days using the criterion 0.5 inches of rain per day. Daewoo alleges in the complaint that disclosure of this information was necessary for it to make an informed bid. The defects in the Weather Clause were "neither known to nor reasonably discoverable by the offerors, including Daewoo, prior to either the proposal submission date or the award of the contract," according to the Complaint.

Daewoo could have asked the Corps for this information.[30] It did that when compiling material for its claim in a January 14, 2002 letter. Daewoo did not show that this information was vital, that it needed to know the information, or that the Government thwarted its attempts to obtain it.

Plaintiff claims in Count III that defendant did not reveal its superior knowledge that the Weather Clause did not include "dry-out days" in the total. The contractor was entitled to non-compensated time extensions after ninety days' delay during a year. That is, the first ninety days were the contractor's responsibility. Daewoo's confusion regarding

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[29] Superior knowledge applies where the Government used some criterion other than the one disclosed, resulting in plaintiff's being misled or needing vital information that it asked for and did not get. Daewoo did not ask for any information about the weather.

[30] Cf. DFK, 45 Fed.Cl. at 288 (showing extensive efforts contractor made to obtain critical information about wind conditions on construction site).

whether dry-out days were "included" was itself confusing. It should have asked.[31]

The contracting officer denied Daewoo's superior knowledge claim. He stated that the "number of anticipated monthly adverse weather days included in the Special Contract Clause 1 was not 'vital' information needed by the contractor and does not rise to the level of 'superior knowledge . . . ."

Daewoo's burden in support of a superior knowledge claim is to prove that the Government failed to disclose a "vital fact" that was not reasonably available to the contractor. It must show that the Government knew or should have known that the missing information would not be available to the contractor. The vital, missing information must have materially affected performance of the contract. See J.F. Shea Co. v. United States, 4 Cl.Ct. 46, 53 (1983) (holding government must possess special knowledge that is vital to contract performance, and that is unknown and not

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[31] Or read the answers to questions asked by others. Tutor-Saliba asked a question pre-bid that would have alerted plaintiff to the dry-out-day issue if it had read the bid materials. After analyzing the days available for construction, Tutor-Saliba expressed the following concern: "Considering the above, we think the construction period (1,080 days) is not sufficient. If we follow your specification Section 00800, Clause 1, the actual working days available without considering holidays are approximately 222 per year. So, total working days for 3 years is 666 days. [Taking into consideration anticipated rain days] while we carry out the earth work, we [will] have to wait one or two more days until the soil is dried." See Post-closing Amendment # 6, Question 105.

reasonably available to the bidder who is thereby misled) (citing Hardeman-Monier-Hutcherson v. United States, 198 Ct.Cl. 472, 477, 458 F.2d 1364 (1972)).[32]

Hardwick Bros. Co. v. United States, 36 Fed.Cl. 347 (1996) is a superior knowledge case that has interesting parallels to this one. The facts are similar, but the efforts and the dedication of the contractor could hardly be more different from those

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[32] See McCormick Constr. Co. v. United States, 18 Cl.Ct. 259, 265 (1989), aff'd, 907 F.2d 159 (Fed.Cir.1990) (holding logs indicated that well driller would encounter difficult conditions, thus foreclosing driller's claim for equitable adjustment when such conditions were encountered.); Petrochem Servs., Inc. v. United States, 837 F.2d 1076, 1078-79 (Fed.Cir.1988) (superior knowledge doctrine applies in situations where contractor undertakes to perform without vital knowledge of a fact that affects performance costs or duration, Government was aware contractor had no knowledge of and had no reason to obtain such information, any contract specifications supplied misled contractor, or did not put it on notice to inquire, and Government failed to provide relevant information); see also Helene Curtis Indus., Inc. v. United States, 160 Ct.Cl. 437, 442, 312 F.2d 774 (1963); Ragonese v. United States, 128 Ct.Cl. 156, 120 F.Supp. 768 (1954). "The government is under no duty to disclose information, such as an opinion or conclusion of its geologist, where the knowledge of both the government and the bidder is based on data equally available to both parties and where more conclusive data is available, but neither party chooses to obtain it." Granite Constr. Co. v. United States, 24 Cl.Ct. 735, 744 (1991) (including a comprehensive summary of superior knowledge cases in this Circuit); see also Hercules Inc. v. United States, 24 F.3d 188, 196 (Fed.Cir.1994) (citing Am. Ship Bldg. Co. v. United States, 228 Ct.Cl. 220, 654 F.2d 75, 79 (1981)), aff'd, 516 U.S. 417, 116 S.Ct. 981, 134 L.Ed.2d 47 (1996).

of the contractor here, Daewoo. The case also presents a vivid example of what the Corps may expect of a contractor doing business with the United States.

The Corps of Engineers contracted with Hardwick Brothers in the late 1970's to construct a system of levees near Brunswick, Missouri. Plaintiff Hardwick filed requests for equitable adjustments after completion of the project. Its claims included defective plans and specifications, differing site conditions, and superior knowledge.

The Corps provided soil boring logs, but most were at least ten years old when the project was to begin. The borings showed that the types of soil in the proposed alignment "consisted primarily of fat clays with high liquid limits." Hardwick, 36 Fed.Cl. at 356. This meant that the soil would "become sticky and present difficulties in supporting construction equipment such as scrapers, draglines and dozers" when subjected to moisture. Id. "Thus, the boring logs contained various indications of the difficult, but not unusual, nature of the soil strata at the site and the potential for equipment problems during construction." Id.

Hardwick "obtained and reviewed the bidding instructions, studied the Plans, visited the job site, interviewed local residents, prepared 'take-off and quantity estimates' . . . [and] made two site visits" prior to bid opening. Id. at 362-63. Hardwick representatives:

> examined areas to be traversed by the levee, estimated the amount of timber that would have to be taken out, estimated the size and

> suitability of the designated borrow areas, determined the amount of trees and brush that would require clearing, viewed the areas where the main concrete structures were to be placed, took soil samples using a two-inch hand-held dynamite auger (so called because it is also used to drill holes for dynamite sticks), tested the stability of the soil at various locations using a small pole five to six feet in length, viewed the old levees to determine the amount of material available in them, estimated the distances required for operating scrapers, appraised the adequacy of the area's drainage, estimated the flow in Palmer Creek, and, based upon the contours shown on the Plans, generally attempted to judge the height of the levee in relation to the surrounding area.

Hardwick's bid was well below those of other bidders and below the Government's estimate. Hardwick experienced many problems during contract performance with "soft soils and wet conditions." [33] It had problems with equipment because of the soft soils and wet conditions.

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[33] Some of the worst flooding of the Missouri River to date occurred during Hardwick's contract performance. While "normal flow in the Missouri River at Kansas City upriver from Palmer Creek [the site of the levee] is approximately 41,000 cubic feet per second (cfs) . . . during construction, the Corps determined that the flow at Kansas City was between 60,000 and 61,000 cfs. [T]he Corps warned Hardwick that the flow would be 5,000 to 10,000 cfs greater than normal for the coming 1979 season." Hardwick, 36 Fed.Cl. at 375.

Nevertheless, the facts suggest this was a responsible and conscientious contractor. Hardwick did not file a claim until after the work had been completed because it wanted to "determine exactly what had happened to cause its perceived losses in performance of [the] contract." Id. at 377.

Hardwick prepared carefully for the job and carried it through to completion notwithstanding difficulties beyond its control. Its efforts stand in dramatic contrast to those of Daewoo in this case in every respect. Nevertheless, the court placed the entire blame on Hardwick. It ruled that "Hardwick's bid was unreasonably low and not that of a reasonably prudent contractor." Id. at 380. The court found that Hardwick's shortcomings "included . . . undue reliance upon the Corps' borings, its failure to review the [Corps'] field books or even request an opportunity to review them before bidding, its failure to take its own deep soil borings, its superficial and inadequate investigation of local conditions, [and] its failure to anticipate and allow for the possibility of the occurrence of extremely severe weather conditions at the site." Id. The court concluded that "plaintiff's bid was below industry standards and highly vulnerable to bad weather conditions." Id. (emphasis added).

Hardwick completed most of the functions that could be expected of a contractor in the circumstances, but it did not do them well enough in the court's view. In our case, the contractor did little to supplement the Government's geotechnical information, other than to conduct its own weather studies. The Hardwick court ruled against the contractor, but its remarks present dramatic

contrasts with the manner in which Daewoo has approached its responsibilities:

> [T]he Project was a very difficult levee project from the outset . . . there were very few levee contractors who could have succeeded, as Hardwick did, in constructing this levee in accordance with the specifications, given all of the difficult weather conditions and other circumstances which Hardwick encountered.
>
> [I]t is a credit to Hardwick's perseverance and the personal determination and integrity of its executives that it completed the work under such conditions.
>
> However . . . plaintiff assumed the risks of bad weather, availability of a skilled labor supply, material supply . . . sufficiency of equipment, subcontractor availability, construction methods, and the accuracy of its bid.
>
> [E]xtremely bad weather conditions were the primary cause of plaintiff's bid being too low to permit it to construct the Project at a profit.

Hardwick, 36 Fed.Cl. at 421 (emphasis added). Daewoo's executives attempted to pass along the risks of bad weather to the Government in this case. Plaintiff was not capable of handling a construction project of this magnitude with the management and the supervisory personnel or the workers that it sent to Palau. It did not send the "first team" that the Corps needed, wanted, and had every right to expect on the job.

The Corps of Engineers did not withhold superior

knowledge from Daewoo. The Corps wanted badly to complete this project on time, and it wanted a road that the Government could be proud of. Interfering with the contractor by any means was the last thing that the Government wanted to do. Plaintiff appeared to think that showing political pressures on the Corps would help its case, but if such pressures existed, they inured to plaintiff's benefit. Political pressures may explain the Corps' not having terminated Daewoo for default early in the process, and perhaps the Government's leniency as well. The Corps found itself in a difficult position, politically or otherwise, in dealing with Daewoo.[34]

C. The Embankment Clause

Count IV of the complaint alleges that the contract's Earthwork Specification is defective. That is, Daewoo's attempts to follow its requirements caused plaintiff delays and additional costs. Daewoo's strategy of attempting to portray the Embankment Clause as a design specification became clear late in the trial. This could be a valid argument only if the contract requirements were in fact design specifications. They were performance specifications, however, and they were Daewoo's responsibility.

Construction of the Compact Road called for a series of "cuts and fills." The terrain was hilly or mountainous. Contractors use cuts and fills to

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[34] The Corps could not enforce its contract terms strictly; Daewoo would have defaulted. It indulged Daewoo to the point that exceptions, waivers and conditional approvals became the norm. DX 1013 CPMI Ex 37.

reduce hillsides and other high ground by removing them with grading or digging equipment, then pushing the surplus dirt to lower areas for embankments and fill. The result is a relatively level road bed. This project required the use of fill or other materials to create a total of 3.3 million cubic meters of embankment.

Specification Section 02225, Sub-part 3.7.1-Earth Embankments provides:

> The material shall be placed in successive horizontal layers of loose materials not more than 200 millimeters in depth. Each layer shall be spread uniformly on a soils surface that has been moistened or aerated as necessary and scarified or otherwise broken up in such a manner that the fill will bond with the surface on which it is placed. After spreading, each layer shall be plowed, disked, or otherwise broken up; moistened or aerated as necessary; thoroughly mixed; and compacted to at least 85% laboratory density for cohesive materials . . . .

The Government impliedly warrants that a contractor following the requirements of a design specification will complete the job in a manner satisfactory to the Government. See United States v. Spearin, 248 U.S. 132, 54 Ct.Cl. 187, 39 S.Ct. 59, 63 L.Ed. 166 (1918). If proper application of the designs does not result in a product acceptable to the Government, the contractor is not responsible, but is compensated for efforts to produce an acceptable end product. Id.

The Spearin Doctrine has evolved two types of

specification, design and performance. Only a design specification produces the implied warranty. See, e.g., Stuyvesant Dredging Co. v. United States, 834 F.2d 1576, 1582 (Fed.Cir.1987) ("Design specifications explicitly state how the contract is to be performed and permit no deviations. Performance specifications, on the other hand, specify the results obtained, and leave it to the contractor to determine how to achieve those results."). See also Util. Contractors, Inc. v. United States, 8 Cl.Ct. 42, 50 (1985), aff'd 790 F.2d 90 (Fed.Cir.1986); J.D. Hedin Constr. Co. v. United States, 171 Ct.Cl. 70, 347 F.2d 235, 240-41 (1965); J.L. Simmons Co. v. United States, 188 Ct.Cl. 684, 412 F.2d 1360 (1969).

The Government is held liable for defective specifications when it mandates adherence to specific means and methods of construction and does not allow the contractor to use its discretion in choosing procedures to accomplish the work. When the Government issues a design specification, it is bound to accept the result that it produces. See Stuyvesant Dredging, 834 F.2d at 1582.

> The difference between performance and design specifications in summary is that performance specifications, "set forth an objective or standard to be achieved, and the successful bidder is expected to exercise his ingenuity in achieving that objective or standard of performance, selecting the means and assuming a corresponding responsibility for that selection." Design specifications, on the other hand, describe in precise detail the materials to be employed and the manner in which the work is to be performed. The

> contractor has no discretion to deviate from the specifications, but is required to follow them as a road map.

Blake Constr. Co. v. United States, 987 F.2d 743, 745 (Fed.Cir.1993) (internal citations omitted); (quoting J.L. Simmons v. United States, 188 Ct.Cl. 684, 412 F.2d 1360 (1969)). The cost of completing a job as designed normally would not be an issue because contractors bid on the design given them. The only issues are whether the design works, and if not, whether the winning contractor is delayed or otherwise harmed by attempting to complete the job with the defective design.

The amount of discretion provided in the contract to choose means and methods determines whether a particular specification is for design or performance. Blake Constr., 987 F.2d at 746. However, the Government can provide some details and directions concerning the performance of work without its necessarily being deemed a design specification. PCL Constr. Services, Inc. v. United States, 47 Fed.Cl. 745, 796 (2000). Strict applications of the Spearin Doctrine do not apply to performance specifications. The contractor is free to employ its own means and methods to achieve an end product that is acceptable to the Government, as in this case.

Plaintiff argued that the contract requirements for compacting embankments were so specific and detailed that defendant should be responsible for any delays in their completion. See, e.g., Util. Contractors, Inc. v. United States, 8 Cl.Ct. at 50-51 ("[D]esign specifications are explicit, unquestionable specifications which tell the contractor exactly how the contract is to be performed . . . .").

The Corps encouraged Daewoo to use its judgment and enterprise in completing the difficult tasks inherent in a contract of this complexity. The Government urged contractors to use "creativity and flexibility" in meeting the challenges of compacting soil on a tropical island with persistent rainfall and high humidity. The embankment specifications are consistent with normal construction standards.

Testimony concerning various bidders' technical proposals regarding rock blends and other compaction methods showed that the Corps of Engineers did not insist on a particular design. The Government's specifications for embankment construction are routine procedures that are consistent with road construction methods worldwide. The requirement that embankments be compacted in 200 millimeter "lifts," or layers, also is standard procedure for embankment construction.[35]

The Embankment Clause in this case was not a design specification. The Government does not care how the job is completed, so long as it obtains what it paid for. Contractors given performance specifications are encouraged to be resourceful and to use their own expertise and ingenuity to complete the

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[35] The Earthwork Specification required that the contractor perform a test section to show that its equipment could achieve the necessary level of compaction. See Specification Section 02225, Earthwork, Sub-part 3.7.2-Test Section: "A test section of at least 3 m by 20 m by 2 m in height, utilizing the equipment and procedures proposed for use by the Contractor, shall be constructed to demonstrate that the compaction requirements in this Specification can be produced."

job on time. The Corps wanted Daewoo's "creativity and flexibility" in handling the difficult conditions that they would find on Palau. A July 2000 letter from the Corps to Daewoo included the following comments:

> Please review your laboratory and field construction methods and consider whether or not different procedures would make meeting your contract requirements easier and more efficient.
>
> While . . . the means and methods for achieving contract requirements are your responsibility, my staff and I are always available to discuss various types of equipment and procedures if you wish.

(emphasis added).

D. Impossibility

A party has no duty to perform a contractual obligation if "performance is rendered impossible or impracticable, through no fault of the party, because of a fact, existing at the time the contract was made, of which the party neither knew nor had reason to know and the non-existence of which was a basic assumption of the party's agreement." Mass. Bay Transp. Auth. v. United States, 254 F.3d 1367, 1372 (Fed.Cir.2001) (citing United States v. Winstar Corp., 518 U.S. 839, 904, 116 S.Ct. 2432, 135 L.Ed.2d 964 (1996)); Hercules, Inc. v. United States, 24 F.3d 188, 204 (Fed.Cir.1994); Opera Co. of Boston, Inc. v. Wolf Trap Found., 817 F.2d 1094, 1100-02 (4th Cir.1987); Restatement (Second) of Contracts § 266 (1979). Impossibility as a legal cause of action was questionable at best, given the facts of this case. The

job today is essentially complete according to contract requirements, with some exceptions.

Daewoo sent a letter to the Government early in the construction process, enclosing four daily reports for the first test section, in Package B. The letter must have been reassuring to the Corps: "Even though it rained [for] four days, the existing soil could be compacted to the specified 85%, with the equipment and methods being employed by Daewoo." See Letter from Daewoo to Mr. Morrison (Aug. 15, 2000).

One of plaintiff's subcontractors, Putra, completed its assigned Package A within the contract period. Plaintiff attempted to argue that Package A was somehow easier or different from the other areas. If so, Daewoo should have devoted additional workers and equipment to packages with more embankments. The key to success on this project was deploying sufficient resources to the right packages at the right time. In other words, proper management. Plaintiff showed no reason why other areas of the project could not have been accomplished as well. Plaintiff spent a year trying to force OCDC to bring enough workers to complete its part of the project. Daewoo would not terminate OCDC when it refused to cooperate, but redistributed its work among other subcontractors. This created added inefficiency and delay. Yet even OCDC had many successful tests at eighty-five percent compaction.

PLAINTIFF'S CASE

We reviewed trial notes and transcripts carefully to insure that issues of importance did not escape notice during the trial because of the unusual

manner in which plaintiff presented its case. Plaintiff did not present a clear legal theory to support its large claim against the Government. It appeared that Daewoo did not expect to find itself in court trying to justify its case; perhaps it thought defendant would pay a negotiated amount. The purpose of the Contract Disputes Act is to prevent this sort of gamesmanship.

The Embankment Clause was so clearly a performance specification that plaintiff's arguments and its witnesses' testimony on this issue were difficult to assess. The discussions of earthwork were pale by comparison with the importance Daewoo attached to the Weather Clause, which was pervasive in plaintiff's case. Nothing about the case was so disturbing as the performance of plaintiff's witnesses, however, particularly with regard to credibility.

A. Plaintiff's Witnesses

Plaintiff's witnesses tended to testify in a vague and unreliable manner.[36] Some were persons for whom English was a second language, and we have taken that fact fully into account.[37] They did not

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[36] We address credibility issues throughout this Opinion. Lack of credibility does not necessarily mean fraud, but a finding of fraud would be unlikely without also detecting substantial credibility problems among witnesses. See UMC Elecs. Co., v. United States, 43 Fed.Cl. 776, 803, 816 (1999) ("Shifting representations are often the mark of fraud and dishonesty."). The willingness of so many Daewoo witnesses to flavor the truth suggested such an atmosphere on the job or within the corporation. This is a judgment that we do not make lightly.

[37] The transcript and the court's trial notes highlight many

seem capable of providing testimony that would support a coherent legal theory, if one could have been identified. This was true despite the court's conviction that Daewoo prepared its witnesses with unusual care. We did not have an effective understanding of plaintiff's legal position other than its insistence on having been misled by the Weather Clause.

Daewoo had little idea how it bid this contract, or did not share it with the court if it did. Plaintiff's management could not or would not explain how they calculated the bid. These included members of plaintiff's estimating team, who evidently did not communicate among themselves about the bid's elements.

1. Mr. Kim

The testimony of Daewoo's Project Manager is exemplary of plaintiff's credibility problems with key witnesses. Mr. Kim's testimony was difficult to follow and inconsistent on important issues. It was unreliable, and disturbing too.[38]

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instances in which such witnesses' fluency in the English language deteriorated markedly once cross-examination began. A number of such examples were so dramatic as to reflect harshly on the witnesses' credibility. The court and the parties had the benefit of competent translators throughout the trial as needed.

[38] Mr. Kim's testimony contained the following:

> Q [Y]ou as project manager knew that you were engaging in a process that resulted in an inaccurate statement of how much work you were doing each month, yet you submitted these forms anyway; is that

Kim certified the claim for $64 million, and he testified that he expected the Government to pay the entire amount. Later the same day, he recanted that testimony, stating that the claim was for only $13 million. Plaintiff's counsel made the remarkable argument that Kim's testimony concerning the amount of the claim, and in fact the complaint itself, are "irrelevant."[39] We understood him to mean that

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right? (Interpreter translates.)

A I don't agree . . . . There are several way to measure the quantity accomplished. This is not final payment. This is interim payment. If some time we got a little bit more, some time we got a little bit less, but when we finish that section, it can be settled. I don't think it's big deal. Tr. p. 9576 (J.W. Kim) (emphasis added).

See Young-Montenay, Inc. v. United States, 15 F.3d 1040, 1043 (Fed.Cir.1994) (confirming it is a "big deal").

[39] At the same time, counsel argued that Mr. Kim certified only $13 million to the contracting officer and not $64 million. Here is what Mr. Kim said:

Q [Y]ou're telling the government by virtue of Exponent's projection of future costs, this is what might happen in the future, or are you actually asking the government to pay you $42 million?

A (Through interpreter) It's hard for me to-It's hard for me to grasp the point of your question. So would you rephrase the question?

Q You've said that the point of putting the future damages in your certified claim was essentially to tell the government to take this seriously.

A Yes.

Q Okay. You didn't know until this morning that one-fourth of the $42 million figure is a projection of future costs, right?

Kim's testimony should be viewed as irrelevant because it was "inconclusive." The testimony was inconclusive because it was "inconsistent." Kim was the project manager. He was the person whom Daewoo authorized to certify claims to the United States on plaintiff's behalf. His "conflicting testimony" on an issue of paramount importance to this case does not go to relevance; it goes to credibility.

Such inconsistencies cast a shadow on Mr. Kim's credibility, but they affected plaintiff's entire case as well. This sort of testimony unfortunately was typical of the manner in which plaintiff prosecuted its claims during trial.

Mr. Kim's testimony also provided examples of Daewoo's lack of good faith. He testified that some part of the claim was intended to indicate "the seriousness of the situation" and to get the Government to "pay attention" so defendant would agree to Daewoo's preferred method of compaction. This is the source of the dispute regarding plaintiff's "negotiating ploy." Using a claim to gain leverage

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A Yes.

. . .

Q Mr. Kim, you certified the claim to the U.S. Government where Daewoo was asking the government to pay Daewoo over $60 million, right?

A We-yeah, I certified over 60 million-

Tr. 9294-9431 (Kim). The only certified claim in this case is for $64 million. That claim, certified by Mr. Kim and denied by the contracting officer, gave this court jurisdiction to conduct the trial.

against the United States violates the principle on which Congress enacted the Contract Disputes Act, including its effort to prevent contractors from using the claims process to obtain higher profits. Congress called it "horse trading."

Daewoo's project manager testified that plaintiff filed at least $50 million of its certified claim as a negotiating ploy; Daewoo's counsel essentially confirmed it: "Daewoo's suggestion that the Government expedite a previously approved and validated alternative embankment placement method is a reasonable request that served the projects best interests and, therefore, is grossly mischaracterized as a 'ploy.'" Unfortunately, Daewoo's "reasonable request" or "suggestion" that the Government "expedite" approval of the cheaper compaction method took the form of a certified claim.

Counsel's other response to this concern was the Government had attempted to save money in the design phase of the project:

> During the design phase of the Palau compact road, the designer stated that the blending of additives or the use of soil stabilization fabric may be required to facilitate earthwork construction with the very high moisture soils. The Government, however, did not incorporate any of these recommendations . . . into the contract because they were considered "too expensive." Instead the Government stubbornly stuck with mechanical aeration as the sole specified means for moisture reduction because, in part, it was less costly.

This is hardly a substantive response to evidence of the Project Manager's using a negotiating ploy to gain leverage against the Government. Plaintiff bid on this project despite such apparent concerns regarding expense of materials, and it bid so low that the Government was concerned that plaintiff could not perform at that level and make a profit. Plaintiff responded to this concern by increasing its bid from $73 million to $88 million.

Plaintiff argued the claim could not have been a negotiating ploy despite the testimony of its Project Manager's because, "[a]pproval was granted before Daewoo even submitted its request for equitable adjustment in March of 2002. Simply put, Daewoo did not submit a claim to receive the Government's cooperation with TCRF-the Government had already granted such cooperation."

Daewoo uses the terms "cooperation" and "approval" interchangeably. We agree that the Corps cooperated at practically every step of this process, including helping to pay for the geogrid materials that plaintiff wanted to test its new and cheaper embankment construction process. Plaintiff still had reason to be concerned whether defendant would approve the TCRF method, however, which has not been approved to this day. That was the reason for plaintiff's clumsy threat or ploy. Defendant did not approve the TCRF method and the road today is finished or nearly finished without it.

Plaintiff noted that the Corps agreed to pay for TCRF materials for test purposes, and it asserted that the Corps' resident engineer "declared the TCRF test session a major success" in January 2002, two months before Daewoo submitted its request for

equitable adjustment. Then, "[o]n March 22, 2002-one week before Daewoo submitted its REA-the Corps' resident engineer approved TCRF in concept, authorized Daewoo to purchase TCRF material for use throughout the project and stated the Corps' design for the use of TCRF would be finalized in thirty to sixty days."

> [These facts] show that the Corps was addressing the embankment production problem long before Daewoo submitted its claim and, specifically that the Corps had approved TCRF before Daewoo submitted its REA. Daewoo's REA simply presented the actual damages it had incurred due to adverse weather conditions and defective embankment specifications up to the end of 2001, and also provided the Government with an estimate of possible future costs. In light of these circumstances, Daewoo's suggestion that the Government expedite a previously approved and validated alternative embankment placement method is a reasonable request that served the projects best interests and, therefore, is grossly mischaracterized as a "ploy."

(emphasis added). Plaintiff's counsel argued that Daewoo filed a certified claim including actual damages incurred through 2001 and added to the certified claim "an estimate of possible future costs" as a "suggestion that the Government expedite" its approval of TCRF in its own best interests. This still sounds like a negotiating ploy.

These are the administrative contracting officer's comments in response to Daewoo's tests of the

geogrid materials, in context:

> The results of the test fill have been very encouraging . . . as you have observed and stated to me the production rates have been much improved. My staff and the design engineer are continuing to evaluate the test fill. We are, however, prepared to validate the concept and give you an option to use the new method.
>
> The final designs and specifics on the alternative method will not be completed for another 30-60 days. I will be providing those to you. With concept approval I am giving you an opportunity to begin the procurement process for the geogrid material should you chose to use the option. I am doing that now and leave the decision on both the option and the procurement process to you.
>
> I remind you that I participated on the costs of the test fill, materials only, as a partnering effort. The hope was that we could find an alternative method of placement that would assist you in improving production. I believe we have done that. This effort does not invalidate the original design. You are free to use the method that best meets your plans and/or facilitates your completion of this project in the shortest time and most cost efficient manner.
>
> The TENSAR Geogrid materials used in the test fill met the strength requirements outlined by my design engineer. My conversations with you indicated that your market survey and cost analysis showed that

> the TENSAR materials provided the best value. Based on that I assume you will chose to use the TENSAR materials for production if you exercise your option for the alternative method. Should you decide you use another material it must be submitted for my review and approval.

Letter from Mr. Morrison to Mr. Kim (Mar. 22, 2001). See PX 255.

2. Mr. Cowan

Testimony of the highest-ranking witness in Daewoo's corporate management presented another dramatic example of plaintiff's credibility problems. Language was not an issue with Mr. Cowan, who is or was a British subject. He often refused to answer the most basic of questions on cross-examination, even after he sought clarification repeatedly. He said he was sent from corporate headquarters in Korea to Palau to "review the situation." He said that often. His duty on the job site was primarily to supervise the process of assembling a claim for equitable adjustment. Daewoo's pre-claim inquiry concerning defendant's use of the weather clause coincided with Mr. Cowan's visit to the Island from corporate headquarters. He testified repeatedly that he was there to "review the situation." Mr. Cowan would not tell the court what he was reviewing or the outcome of his review. His primary duty was to compile plaintiff's claim.

Mr. Cowan's other responsibility in the case had

been to lead the team that calculated plaintiff's bid.[40] He permitted serious misunderstandings and conflicts regarding the basis for plaintiff's bid to linger throughout pre-trial, and even during trial. Mr. Cowan testified he was unaware that Mr. Song had used 900 cubic meters per day per crew rather than 1200 meters as the embankment productivity rate in Daewoo's final proposal. Tr. 670-71 (Cowan). This "mistake" was widespread among Daewoo officials; people made it repeatedly even though it could easily have been resolved if anyone had reviewed the proposal. See, e.g. PX 304. It seemed that plaintiff's use of the higher production numbers in figuring the claim would have had an inflationary effect the amount of damages, but plaintiff's counsel explained that it resulted in a lower claim:

> Daewoo based its final bid proposal on a double shift labor productivity rate of 900 m3 per shift, resulting in a planned daily productivity of 1800 m3. (citing Tr. p. 16312 (Cowan)). The evidence offered at trial, however, demonstrates that any mistake in the productivity rate constitutes an inadvertent and immaterial error, which importantly was never used as a basis to support Daewoo's claim at trial. Id. Daewoo

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[40] Mr. Song and Mr. Cowan had primary responsibility for drafting the bid. Their testimony regarding plaintiff's reliance on the weather clause in preparing the bid was not credible. Mr. Song and Mr. Cowan generally did not respond to the Government's questions regarding their bid preparations, and sometimes they contradicted one another.

> originally intended to 'double shift' its work on the Project. Id. In fact, Daewoo only determined that double shifting its earthworks was impractical after experimenting with double shifting during the 'Package B' embankment test section in July 2000. Had double shifting proved feasible,[41] it would have resulted in a planned daily labor productivity rate of 1800 m3, significantly greater than the 1200 m3 rate mistakenly used in Daewoo's claim. Id. Because Daewoo's initial claim pricing method was to claim for losses due to its inability to meet its planned productivity, its use of the incorrectly lower 1200 m3 planned productivity rate resulted in a lower claim amount.

(emphasis added). Daewoo hoped for 900 cubic meters per crew per day, as we understood it from Mr. Song's bid calculations. Plaintiff calculated the claim based on the difference between what it thought it would produce-the mistaken rate of 1200 cubic meters apparently-and the actual rate, dampened allegedly by the weather. Counsel's argument shows how plaintiff employed the nebulous term "planned" in Mr. Stone's testimony and elsewhere.

We could not rely on the testimony that Mr. Cowan presented so grudgingly on cross. He lacked

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[41] This is the closest we have come to finding an explanation of why plaintiff did not double shift as promised pre-bid.

credibility in practically every respect. He returned to testify in the fraud trial, where his testimony was even more questionable.

3. Plaintiff's Experts

Mr. Kim and Mr. Cowan were not plaintiff's only witnesses with credibility problems. Such issues arose in connection with much of plaintiff's case, especially including the testimony of its experts. Mr. Cotton, defendant's certified fraud examiner, testified that Exponent's behavior in this case was at best "professionally irresponsible." Certainly, their testimony during trial and in plaintiff's rebuttal case did nothing to dispel that appraisal for the court.

The testimony of plaintiff's expert witnesses was obtuse. It was not always clear what they were attempting to accomplish or avoid by their use of such careful semantics, however. They jostled with government counsel about whether the firm was hired to "update" plaintiff's certified claim or to "reprice" it. The title page of their expert report stated that it was an "update." Presumably, they preferred the word "reprice" because Exponent wanted it known that they had nothing to do with the certified claim, which they reduced by more than $20 million from $64 million (or increased by approximately $30 million from $13 million). "Update" would suggest that they started with numbers used in the certified claim and refined them, accounted for passage of time for example, but that was not the case. Each expert deferred to the other for responses to questions that both should have

known but could not or would not address.[42]

The experts emphasized that they had not read the certified claim they were to update or reprice. They wished to distance themselves from any numbers or supporting data that had been a part of that claim. The issue became more cloudy later in their testimony. Mr. Allen reported that he may have "looked it over. That's all." Mr. Freas "did not go in and look at Daewoo's bid in its entirety, check every single number, every single quantity. That I did not do."So either they merely scanned the certified claim or they did not read it at all.

Plaintiff's experts formulated a new method of calculating the $64 million claim that Daewoo had certified and submitted to the contracting officer. Exponent's "Measured Mile" method was not a part of the claim that Mr. Kim certified.[43] The experts' method resulted in an entirely different claim to the

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[42] For example, government counsel asked Mr. Freas, "Exponent no longer stands by this projected number of $10 million, correct?"

> A You'll have to talk to Mr. Allen about that.
>
> Q Well, I'm talking to the project manager for Exponent.
>
> A And as I defined project manager yesterday, that's an administrative responsibility for our project assignments. Mr. Allen is the expert on this area of testimony. You'll have to ask him.

[43] Exponent did not explain well the criteria for choosing measured mile comparisons. In some cases, the experts did not use such criteria in any event, but exercised "engineering judgments." See PX 280, p. 81.

Government, approximating $42 million. The contracting officer had no opportunity to consider a claim constructed by use of a measured mile, or one for $22 million less than the certified claim. The claim calculated by Exponent using its measured mile approach has not been certified to this day. The claim that was certified by plaintiff's project manager became an orphan during trial, supported by no one and barely acknowledged by plaintiff's attorneys.

4. Mr. Richardson

Mr. Richardson had spent most of the two years prior to trial working on the claim. Government counsel asked if he had "scripted" his testimony; that is, did he have "the agenda of what you wanted to testify about, not [plaintiff's counsel]." Tr. 1104 (Richardson). We had the same impression of that witness.[44] He pursued this claim with zeal and utter dedication, well beyond the level that might be expected of a corporate witness. Richardson attended virtually every day of trial and served as a sort of lay assistant trial attorney for Daewoo. He was experienced in government contracting and the operation of the Contract Disputes Act as well. Richardson testified both in plaintiff's case-in-chief and in the fraud case. His testimony on direct was an element of his credibility problems during trial,

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[44] His direct examinations clearly were prepared and delivered according to his views on how the case should be tried. While it is not unusual or improper for witnesses to rehearse their direct testimony with counsel, Mr. Richardson seemed to have taken care of much of his own preparation. Plaintiff's counsel could not always keep up.

where often plaintiff's attorney could not or did not attempt to control him. His testimony on cross was damaging to his credibility and to Daewoo's case.[45]

Government counsel highlighted on cross the extent of Richardson's participation in plaintiff's claim development process as he had described it during direct testimony: (1) He analyzed actual adverse weather days incurred on the project, (2) stated his opinion that the .5 inch threshold used by the Corps was "completely inappropriate," (3) constructed a weather model that involved gathering historical averages of rainfall data for ten years, (4) formulated legal theories that were included in the certified claim, including the decision that this was a defective specification claim based on the soil specifications and the weather clause, (5) interpreted the contract clauses involved in plaintiff's claim and testified at length about their meaning, (6) redeveloped the rain clause by applying engineering regulation 415 and his own weather model to arrive at what he thought SEC-1 should have said, (7) compared his weather model to the work done by plaintiff's expert, Professor Moselhi, (8) constructed a flip chart to illustrate the results of his weather studies, (9) applied his weather model to project future rain days, (10) used Mr. Cowen's numbers to

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[45] Mr. Richardson evidently did not prepare so well for his cross-examination, which confirmed the negative impressions that we obtained from the testimony of other witnesses. His testimony during both phases of trial left no doubt that plaintiff's case was unsupportable and was pursued by Daewoo with fraudulent intent.

apply dollars to projected delays, and (11) assembled and compiled field density tests. See PX 295.

Mr. Richardson acknowledged that his "real job" was to be in charge of the project schedule, a major shortcoming of plaintiff's case. Richardson testified that "somebody else" was handling the schedule during that period though, "I still participate to some extent, not the way I was before."

The witness clearly attached importance to his contributions in developing the claims and presenting them to the court, including the technical and legal assistance that he contributed to the certified claim itself. Often he would anticipate or reinterpret his counsel's questions, or worse, correct them. Yet asked on cross if he would certify the claim today, he became vague. Finally, he testified that he would "probably use a different method" because his knowledge then was different from now but he refused to say he would not sign it today: "I can't say that. I think it was reasonably done and, yes, I might sign it. Yes." [46]

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[46] Mr. Richardson's testimony included the following:

Q You might sign a claim right now for $63 million?

A Not for $63 million if it was updated today.

Q Would you certify it right now? With this type of data? Exactly as is.

A I would probably revise some of the methods of costing that are in it.

Q So the answer is no, you wouldn't, because you would want to revise some of the methods.

A Yes.

Q So that, right now, you couldn't, in good faith, sign a document that says the supporting data in the claim is still accurate today, right?

A I would believe that the data that is in there, the underlying data, is accurate. The cost data, not the calculations.

Q OK. Well this claim as we talked about earlier was an attempt to depict what was going to happen in future right? That is that Daewoo was going to incur these extra costs.

A Yes.

Q Alright. You know that what you thought was going to happen did not happen right?

A Correct.

Q So that's one thing that's inaccurate. [If] everything in that claim, in this certified claim that led to the prediction that what you thought was going to happen and didn't happen, all of that data is wrong, right?

A That would change as far as the future estimate yes.

Q OK . . . you do not believe that $13 million, $50 million or $63 million accurately reflects the contract adjustment to which Daewoo believes the Government is [responsible]?

A I would have to answer I would have to compare, at this point in time, how those costs have accumulated as they have been shown in the methods shown by the REA.

Q Mr. Richardson, didn't you hire [Exponent] to do that for you?

A Yes.

Q And they didn't come up with the same numbers right?

A They used different methods.

Q Alright well not only did they use different methods,

5. Mr. Stone

Mr. Stone showed up on Palau for a week or so to make crucial calculations that appeared on two pages of plaintiff's claim and had broad implications for Daewoo's case.[47] His task had been to handle plaintiff's loss of productivity claim. Stone testified that he discussed the matter "at great length" with Cowan, Richardson, and Painter, and decided the best way to show losses for the certified claim was to use the amount that plaintiff planned to spend, rather than the amount actually spent for earthwork. He knew how much earthwork Daewoo had moved, but it was not so clear how he developed its unit cost, the "planned estimated actual cost" as he put it. He testified that the company's books and records did not show the actual cost per unit.

Mr. Stone's narrative in the claim does not identify the cost of operations as planned cost of operations, however. Stone omitted the word "planned" and wrote, "the cost of operations was $3.3 million." Tr. p. 17430-17431. That is the number in the claim. Asked whether "[i]t is possible to go into

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but they came up with a significantly lower number right?

. . .

A They came up with a different number. Yes they did.

[47] Mr. Stone's name had not been on the witness lists, and no one had mentioned him until the waning days of trial, during the cross examination of Mr. Richardson. The circumstances were such that frankly, we wondered whether he was a real person.

Daewoo's books and records to figure out what Daewoo's costs of operations for excavation really were for that period of time," Mr. Stone responded, "I don't know." Tr. p. 17434-17435 (Stone).

> Q You're saying that there were people coming in and out of the room and that the decision was made to not use Daewoo's actual cost of operations, but instead to depict Daewoo's costs of operations as this $3.3 million figure . . . ?
>
> A I was asked to do a calculation for loss of productivity . . . and I chose to use this method that we discussed at great length between Mr. Richardson, Mr. Kim, Mr. Painter and myself . . . . Tr. p. 17433.
>
> Q Did you decide to use the words "the cost of operations was . . . ?" Tr. p. 17434
>
> A Yes, I did.
>
> Q And it is not actually the cost of Daewoo's operations, true?
>
> A It is by the way I developed this document, it is.
>
> Q We already agreed earlier, didn't we, that it is actually the estimated costs that Daewoo planned to have spent, rather than the actual costs?
>
> A I don't say actual cost. I say the cost of operations. And the document describes how I came about that number. I don't say it's actual costs or not.

To get a number to subtract from the planned cost of operations, Stone looked at actual production, in this case a number of cubic meters of material that

Daewoo had excavated as of December 31, 2001. This number was 755,000 cubic meters, which he obtained from progress pay estimates.

> Q So you looked at Daewoo's actual records to determine what they had actually excavated, true?
>
> A Yes.
>
> Q And then you multiply that by $1.70 true?
>
> A Yes.

Tr. p. 17435

Government counsel wanted to know how Stone knew Daewoo spent $1.70 per cubic meter to excavate that 755,000 cubic meters. He responded, "[t]hey had estimated that would be their planned cost and so forth."

> Q Right, so this is actually a planned number not an actual number, true?
>
> A It is the same type of estimated plan, actual cost estimate for that unit of production.

The Government asked about the records available to figure the cost of excavating the 755,000 cubic meters of material.

> A "You don't know, true?"
>
> A No, as far as I was concerned Daewoo kept very good records.
>
> Q OK so all Daewoo needs to do is consult its very good records to figure out whether it

actually spent $1.70 per cubic meter of material excavated right?. . .

A It would depend on how they kept their job cost records. I don't know . . . what format they kept them.

Q Alright, is it fair to say that you, Bill Stone, did not make an effort to figure out [Daewoo's] actual cost per cubic meter . . . ?

A My approach was to take a scheduled value unit price and subtract the home office overhead and the profit, determine a cost, and estimate a cost that was a planned actual estimated cost . . . .

Q Did Daewoo bill $1.2 million for the excavation during that period?

A They billed that in addition to the home office overhead and the profit, [$2.02] but the $1.70 was included in the 202.

Q OK, we've got this number, that is an actual number right?

A Yes.

Q But this $1.70 is not?

A It's a planned, estimated actual cost.[48]

Stone's claim narrative states, "Daewoo's cost is calculated." The Government asked whether it would have been more accurate to state, "Daewoo's

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[48] Plaintiff's attorneys used the same device: "Daewoo based its final bid proposal on a double shift labor productivity rate of 900m3 per shift, resulting in a planned daily productivity of 1800 m3."

planned cost is calculated."

A A more accurate way would be Daewoo's estimated planned actual cost would be more accurate.

Q OK, then here we are now down at the bottom line. We take that $3.3 million figure that you calculated as Daewoo's costs of operations up here and we're going to subtract just $1.2 million that was billed during this period and there's your claim, right, $2.023, right?

A Yes.

Q By the way, if you had used the actual dollars that were billed to the Government for excavation, it would be a higher number right? You would use the $2.02 number?

. . .

A Yes, which would include overhead and profit.

Q Exactly. And if you used the 2.02 figure that would increase this number to $1.2 million number ?

A Yes.

Q That would lower the claim, true?

A Your mathematical example is correct.

The reason that plaintiff used this imprecise method, other than its inflationary effect on the claim, was either that Daewoo's books and records were not sufficient to calculate a better number, or because management did not want to look at the books and records. The latter approach is the one plaintiff took when using the Corps Manual rather

than actual costs of acquisition and maintenance of equipment.

> Q Your cost of operations figure is not based on any actual cost of operations right?
>
> A It's based on actual, estimated costs.

Stone testified that the cost of operations do include some actual costs because "it's made up of whatever the total expenditure would be, whether it's estimated or an exact number. This is an actual estimate of that, based upon our schedule values." Tr. p. 17445 (Stone).

> Q You can go to Daewoo's books and records, figure out how much they spent for excavation, compare that to how much they planned to spend and if it numbers the same there's no loss of productivity, OK?
>
> A Yes.
>
> Q Let's go back to Daewoo's books and records and the decision not to consult Daewoo's books and records to figure out how much Daewoo actually spent to do excavation. Isn't that a good way to look and see whether Daewoo actually experienced a loss of productivity or not in the first place.
>
> A That's one method.
>
> . . .
>
> Q You don't know as you sit here today whether Daewoo spent $1.70 per cubic meter to do this excavation, the 755,000 cubic meters or not right?
>
> A [T]he analysis that I did was based upon this methodology. There are other

methodologies which you can use. Measured mile, actual cash expenditures, or this method.

Defendant tried again:

Q You don't know whether Daewoo spent $1.70 per cubic meter of excavation to do the 755,000 cubic meters during this period or not correct?

A They told me that the cost of this item had greatly exceeded any planned activity or planned expectations that they had.

. . .

Q How do you arrive at the opinion that Daewoo has greatly exceeded its planned expenditures for excavation, unless you know how much they spent.

A I didn't arrive at any opinion.

Q Right, you were told?

A No I was asked to perform a calculation.

Q Mr. Stone you just said you were told that they had greatly exceeded their expenditures beyond any plan for excavation. Is that true or not.

A In a general sense yes. (Emphasis added).

Mr. Stone knew only that the cost per cubic meter of excavation to move the 755,000 cubic meters "greatly exceeded" the amount plaintiff had planned to pay for the job. He knew this because Mr. Cowan and Mr. Richardson told him. Somehow, he arrived at $1.70 as the unit cost and subtracted the planned amount from the "actual" amount and used that as Daewoo's loss of production attributable to the

Government: $3.3 million.

6. Mr. J.H. Song

Mr. Song was the Geotechnical Manager. He was coordinator of the estimating team for the Palau Compact road project. His testimony presents a common example of how difficult many of plaintiff's witnesses were to follow:

> Q Did anything that happened between April of 1998 and Daewoo submitting its final bid in January of 1999 cause you to change your conclusion that reducing the high natural moisture content in the soils of Palau would be a difficult task?
>
> A Yes.
>
> Q Something caused you to change that opinion, is that right?
>
> A No. Basically, the aeration and the drying of the high moisture contents is difficult.

(Song, Tr. p. 2430). Yes or No? Despite his expertise as a geotechnical engineer, Mr. Song was comfortable offering the following testimony to clear matters up:

> Q Okay. So you're saying that when, later in this report, they talk about lowering the percentage to 85 percent, you interpreted that as eliminating the need for significant drying, is that right?
>
> (Translator speaks in Korean.)
>
> A (By Translator Lee) Yes.
>
> Q Okay. And that is why you said, in April, you thought this project was going to be difficult to reduce moisture content, but then, when you got the geotechnical report, you

changed your outlook and thought that it would be easy, right?

A Yes. Our construction, I thought will be easy I think. I thought like that.

. . .

I think the reduc[tion] of the moisture content is very difficult. But, after receiving of the geotechnical report. the designer already knew the situation. They already recognized the situation. So they already make a test. So they make a reasonable compaction nature considering the high moisture and the drying. Yes.

Q [T]he geotechnical report, is the only reason why you changed your opinion that this job was going to contain a difficult soil moisture reduction amount of work, is that right?

(Translator speaks in Korean.)

A Yes.

Q Okay. Nothing else caused you to change that opinion. No investigations that you had done yourself. No books or anything that you had read. No interviews with other people about what it was like to work in Palau. You thought this was going to be hard until this geotechnical report assured you that it would be easy, is that right?

A Yes.

(Song Tr. p. 2436-7) (emphasis added).

Plaintiff's geotechnical engineer, and a key ember of its estimating team, testified that the

Government's willingness to reduce the compaction requirement from the normal ninety percent to eighty-five percent to assist contractor productivity, caused him to believe that the compaction job would be "easy."[49] This testimony was not credible.[50]

7. Mr. S.K. Djou

Mr. Djou was a geotechnical expert. He testified for Daewoo, but the significance of his testimony to the court was that earlier, he had been a consultant to Tutor-Saliba, a reputable contractor that participated in the bidding process on Palau. He testified that a "competent contractor" would have hired an expert to assist in the bid, as Tutor had by hiring Djou himself. Daewoo did not hire an expert

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[49] Plaintiff stated at paragraph 27 of its complaint that the Corps of Engineers:

> [r]ecogniz[ed] the difficulties of building the embankments as specified in the contract, and as a result of the Daebon Report recommendations and subsequent meetings between the Corps, Daewoo, GeoLabs, Daebon, the Corps lowered the relative compaction requirement for embankments from the Government specified 85% to 80% in the top ten meters of the embankments. The lower compaction requirement was approved without a deductive change order.

It is difficult to know how plaintiff must have interpreted this change, to include it in the complaint. We viewed it as another example of the Government's making every effort to help increase plaintiff's productivity while still maintaining minimal professional standards.

[50] Witnesses also were willing to testify that Daewoo was misled by a document describing the need for aeration of soils for compaction as "some" rather than "substantial."

to help with its bidding process.

Daewoo had criticized Mr. Lim, the engineer at GeoLabs who compiled the technical information for the Corps' geotechnical report, suggesting that the material was misleading or that he made recommendations that were not achievable. Djou testified, however, that Mr. Lim had "engineering choices" to make regarding the density issues and other matters related to soil compaction, and he, S.K. Djou, did not think the choices Lim made were unreasonable.[51]

8. Professor Moselhi

Professor Moselhi submitted a report analyzing the weather in Palau and predicting its impact on this Project, according to plaintiff's counsel in post-trial briefings. See PX 278. Plaintiff stated: "Professor Moselhi testified that the weather in Palau would cause 169 days of weather delays to the earthworks to be performed on this Project, assuming 'average' drying conditions," Tr. at 2101-2105 (Moselhi). He also testified that drying conditions in Palau could be classified as "poor." Well, yes. This was the point of the pre-Project disclosures and the warnings to bidders that are sprinkled throughout this Opinion. This would have been a helpful report for Daewoo to have commissioned before bidding on the Project, but it did not. Daewoo was among the bidders that did not heed the Government's and

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[51] Plaintiff did not review its field density tests, which would have shown that eighty-five percent compaction was readily achievable. DX 1021 (Assorted Field Density Test results).

GeoLabs's warnings and obtain expert assistance in compiling its bid.

B. Productivity Rate

No issue other than the Weather Clause commanded so much attention as the "mistake" that plaintiff's witnesses claimed everyone at Daewoo overlooked for so long. The productivity rate for excavation was an enduring mystery during trial. No one seemed to know how it was calculated, or even who calculated it. No doubt exists as to its effect, however. Mr. Cowan and his estimating team supposedly assumed that Daewoo would excavate 1200 cubic meters of fill per shift, per day, in calculating its bid. This is the number that Mr. Richardson and others, including Mr. Cowan, and especially Mr. Stone, used to calculate Daewoo's loss of productivity for purposes of the claim. That number either changed or always had been 900 cubic meters per shift, per day instead. This problem arose repeatedly during trial, and plaintiff's experts did not attempt an explanation.

Mr. Song was the person who put the bid together, but no one asked how he arrived at the productivity rate used as a basis for the bid calculations. Mr. Song did not document his method of bid calculation. His bid papers were illegible scribbles on a few pieces of paper.[52] DX 1051 (Song Bid Papers). No one who worked on Daewoo's bid

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[52] Government counsel appropriately termed it a "bar napkin approach." He introduced Tutor-Saliba's calculations for its bid, which appeared to be a detailed spreadsheet printed from a computer.

proposal (Cowan, Richardson, Kim, Painter, Stone) attempted to understand Song's estimate or ask Mr. Song about his calculations.

Mr. Cowan testified that he had not seen Mr. Song's bid papers until a year before trial. Tr. 670-71 (Cowan). In fact, he made no effort to gather information related to the formulation of any aspect of Daewoo's bid price. Tr. 680 (Cowan). Mr. Cowan was not confident that basic information such as whether the bid was based upon ten or twelve-hour shifts exists. Tr. 685 (Cowan). Mr. Cowan testified that he has never seen documentation for the production rates used by Daewoo. Tr. 822 (Cowan). Production rates might have changed when Mr. Song adjusted the periods in which Daewoo would be doing earthwork. PX 109 (Final Proposal); Tr. 2400, 2402 (Song).

Daewoo's experts used the 1200 cubic foot productivity assumption in their claim calculations. This had the effect of inflating their version of plaintiff's claim substantially. Mr. Freas, who calculated Daewoo's delay damages, did not ask questions about the productivity rate, though his entire analysis was based upon the premise that Daewoo's 1200 cubic foot rate was reasonable.[53] Mr. Freas acknowledged that if he had conducted an investigation of the supporting data in Daewoo's

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[53] Daewoo admitted finally that its 1200 cubic meter per crew, per day rate was overly optimistic, and that its bid proposal was based on 900 cubic meters. Such lack of diligence and willingness to investigate basic facts related to the claim enabled the creation of a false record.

claim, the "number would be reduced." Tr. 12883-84.[54]

C. Plaintiff's Inefficiency

Defendant showed that plaintiff's inefficiency and other problems were attributable to Daewoo and its subcontractors, not to the Government. Most problems with operations on-site were not related in any way to the Corps' activities. Plaintiff made no effort to separate from the claim defendant's substantial evidence of plaintiff's own delay and inefficiency. An extended discussion of such problems seems unnecessary in a lawsuit devoid of government liability.

One example was plaintiff's problems obtaining reinforced concrete pipe, which was delivered late or in pieces. Daewoo needed reinforced concrete pipe for culverts and other drainage facilities. Mr. J.W. Kim, plaintiff's Project Manager, wrote this letter to Daewoo's supplier, Lysander Shipping in January 2002:

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[54] Mr. Freas testimony contained the following:

Q You didn't check the quantities or the production rate that you put into your report. That was one of the things you didn't do, right?

A The 1200 number?

Q Yes.

A That was expressed in the report as it is.

Q Right, and we now know that a thorough investigation would have revealed that number was wrong, correct?

A That number would be reduced.

> I am writing to express my concern and disappointment with the services you are providing in relation to the current shipment of concrete pipe from Indonesia. Although the original estimated time of arrival to [Palau] was November 22, 2001, we have still not received the shipment and have not been provided a firm: date when we can expect the pipe to arrive. Since the original ETA of November 22d we have received from you five separate estimated times of arrival ranging from December 6th to the most recent date January 4, 2002. We understand the shipment is still in Indonesia either awaiting repairs to the tug or "better weather"and the January 4 date is not valid. You need to he aware that our company has been damaged by the late arrival of this shipment. Lack of concrete pipe has caused delay to the project and has exposed us to claims by our subcontractors. Costs associated with the delay include standby of labor and equipment. We intend to recover these costs from your company.

Letter from J.W. Kim to Lysander Shipping (Jan. 4, 2002); DX-1013; CPMI Exhibit 66.

Most of Daewoo's subcontractors were not effective substitutes for the "first team" that plaintiff promised to use on this job. Nowhere was this more evident than in construction of embankments and other earthwork. Plaintiff had serious problems with subcontractors who were deficient in a number of areas, according to Daewoo itself. Such deficiencies attributable to one subcontractor, OCDC, were in the

areas of management, manpower, and equipment. An early letter from plaintiff's project manager, M.S. Kim, to OCDC, states:

> We are writing to express our concern with your lack of resources needed to complete this project in a timely manner. While we acknowledge the difficulties we have all been experiencing with the weather, you do not have sufficient management, manpower and equipment on site to take advantage of the improving weather conditions.
>
> MANAGEMENT: Currently, in Package B, you have no office engineers and only one field engineer. Your project manager Mr. Calawen is acting as office engineer and subsequently has no time to control the field work. In Package A, there is no site manager. This is totally inadequate and is resulting in poor progress and poor quality of work.
>
> MANPOWER: Your current staff of equipment operators is far below what is needed to maintain satisfactory progress. Rather than increase your work force, you are actually returning men to the Philippines. This displays your total lack of concern for progress on this project. We find that you are 51 personnel short of the staffing required. You have only 3 common laborers. When common work is required to be done, your equipment operators are taken off earthwork and are used elsewhere. We find that you are short 32 equipment operators. To our embarrassment with the Owner, we find that

> one operator will act as operator for a single operation involving excavator, loader and dump truck. Again, this is totally unsatisfactory. Further, you have no blasters on site. Rather than being able to carry out blasting by your own forces, we have to take personnel from other sites to carry out your work.
>
> EQUIPMENT: Your equipment is inadequate only in that we believe you to be lacking 4 jack hammer attachments for excavators and perhaps one additional excavator is required. While your equipment spread is closer to meeting the requirements, what use is the equipment without operators to man it?

Letter from M.S. Kim to OCDC (Jan. 23, 2001). Problems with OCDC continued, but Daewoo did not remove that subcontractor from the project. Instead, it re-assigned the work to other subcontractors. Sunjin was another subcontractor that created problems and delays for Daewoo. Sunjin was responsible for producing concrete for the project, an important supply. Daewoo terminated Sunjin in March 2001, two years into the project, because "[y]our continued lack of performance has caused significant delay to the project and it has damaged our company." See Letter from Mr. Kim to Sunjin (Mar. 20, 2001). Sunjin had been a major subcontractor, providing materials important to building the road. Terminating such a subcontractor two years after beginning contract performance caused plaintiff to effectively start over in some areas.

The transcript contains many examples of plaintiff's own delays and those of its subcontractors. Other examples are its problems with bridges, culverts for proper drainage, survey errors, cold joints for concrete work, and asphalt production. Plaintiff's answer to most questions about its inability to quantify alleged damages and to separate and account for its own delays, was the use of the "measured mile" approach by Exponent. Daewoo did not certify that method of estimating delay costs, however, or the "claim" that resulted. Daewoo did not submit the claim or its supporting data to the contracting officer for consideration.

D. Measured Mile

The measured mile approach to damages is a form of total cost calculations that requires subjective judgment calls by the expert, who estimates damages by comparing periods of production that are unaffected by the contractor's alleged government-caused delay, with periods during which delays affected its production adversely. In this case, rain days were used to determine government-caused delay for the most part. The experts merely compared periods affected by rain delay with periods unaffected and presumably efficient, and developed an inefficiency factor. They applied this factor to the project and applied a cost of delay to calculate total costs through completion of the contract.

Contract Boards have accepted the Measured Mile method on occasion. We assume that a finder of fact faced with such a method of estimating damages would want to have confidence in the experts' ability and objectivity. A court would be particularly concerned to know how the experts picked periods of

productive and non-productive construction for comparison. We did not have such a level of confidence in plaintiff's experts. Cross examination showed their choices of productive and non-productive periods to be arbitrary at best. More likely, they were chosen to achieve a pre-determined result. Mr. Cotton testified that Exponent's approach to this assignment bordered on the unprofessional. We agree for reasons that appear throughout this Opinion.

E. Schedule

Contractors have the burden of proving delays attributable to the Government. It may be impossible to establish government-caused delays without a means of showing the critical path. See, e.g., Wilner v. United States, 26 Cl.Ct. 260, 274 (1992) ("Without a critical path analysis, the court [could] not exclude the possibility that the contractor caused concurrent delay on the project.") rev. on other grounds, Wilner v. United States, 24 F.3d 1397 (Fed.Cir.1994).[55]

If Daewoo were entitled to damages due to defects in the Weather Clause or the Embankment Clause, plaintiff could not have calculated those

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[55] The Wilner trial court made this observation, having completed a thorough review of trial testimony and other exhibits: "Unfortunately, [plaintiff] failed to supply a critical path analysis, and the court is not obligated to attempt to construct one for him. Due to the absence of plaintiff's view of the critical path, the court cannot assign weight to any concept of the critical path as propounded by plaintiff." Wilner, 23 Cl.Ct. at 256.

damages properly.[56] Trial exhibits contain no evidence that Daewoo scheduled this project pre-bid by use of a critical path method or similar device.[57] If plaintiff developed such a schedule after arriving at the site, we doubt that Daewoo used it properly, if at all. Contractors must have such a schedule to perform complex construction tasks properly over time. A critical path or similar plan is an important tool for any contractor attempting to complete a project so complex as this one, where many tasks are interdependent. Daewoo's contract required it.

Plaintiff's ability to schedule complex, interdependent tasks was far more important to the Government than Daewoo's ability to prove any claims that might arise. Daewoo did not provide a critical path or similar schedule to the Corps that showed the project's being completed according to contract requirements. Thus, Daewoo was unable to

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[56] No time extensions were due for work not on the critical path regardless of how severe the weather Daewoo experienced. Daewoo must have been attempting work on the critical path and been prevented by weather for at least half the working day to qualify for a non-compensated extension of time under the contract. Tr. 14899 (D'Onofrio); DX 1039 80/95.

[57] See, e.g., Wilner v. United States, 24 F.3d 1397, 1399 n. 5 (Fed.Cir.1994) ("A 'critical path' is a way of grouping interrelated activities in a construction project. A delay to an activity that is on the 'critical path' usually results in a corresponding delay to the completion of the project. 'The reason that the determination of the critical path is crucial to the calculation of delay damages is that only construction work on the critical path had an impact upon the time in which the project was completed.'") (quoting G.M. Shupe, Inc. v. United States, 5 Cl.Ct. 662, 728 (1984)).

budget its time so that it would clear and grub, cut and fill, move earthwork and construct embankments, pave roads, and complete the job on time according to contract specifications and requirements. This is evidence that plaintiff's alleged surprise regarding the amount of rain on Palau or the difficulty of compacting its soil as a reason for delay was invalid and untrue. Daewoo did not provide the Corps a schedule showing it completing the work on time because it could not.

DEFENDANT'S COUNTERCLAIMS

The character of the trial changed dramatically when the Government sought leave to amend its answer to add fraud counterclaims. The timing of defendant's motion was a concern, and we considered carefully whether the amendment was reasonable and timely in the circumstances. Defendant's counsel represented that he did not anticipate all of plaintiff's testimony and could not have. He did not anticipate even some of plaintiff's legal arguments. These assertions were understandable given the nature of plaintiff's presentation of testimony and other evidence during trial. We were similarly surprised by the proceedings, and dismayed.

The evidence of fraud arose from and during the testimony of plaintiff's own witnesses, during its case-in-chief. This was another reason to permit defendant's counterclaims. The Government showed primarily through cross-examination that it was not liable on plaintiff's claims, and that Daewoo's claims were fraudulent. Defendant used its own case to establish additional evidence supporting findings of fraud and quantifying them. Defendant did not hire new experts to pursue its fraud counterclaims or call

new witnesses. Its accountants expanded their testimony somewhat to include additional examples of plaintiff's efforts to inflate its claims. We offered plaintiff's counsel the opportunity to depose defendant's expert witnesses on the expanded testimony, but they declined.[58]

Despite the magnitude and importance of this case, plaintiff did not present a coherent legal theory for recovery other than its insistence on having been misled by the Weather Clause. Every witness seemingly was instructed to emphasize that the Weather Clause was misleading. The Embankment Clause received far less attention, with good reason: it is a performance specification that leaves the means and methods of construction to the contractor.

The Government is entitled to judgment on all its counterclaims for reasons discussed throughout this Opinion. Plaintiff made obvious mistakes and overly-optimistic assumptions in its bid proposal, but its claims against the Government go well beyond mere error or oversight.

A. Fraud

Daewoo bid the road construction job improperly and handled its basic management inefficiently. Its legal theories remained diffuse and uncertain

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[58] Daewoo also declined to put on a rebuttal case at the conclusion of defendant's fraud case. We offered to stay an additional week if necessary for plaintiff's counsel to prepare, but they rejected this proposal as well. Plaintiff's legal team insisted that the only possible cure for the prejudice created by defendant's counterclaims was a continuance; each of plaintiff's four attorneys made this motion repeatedly.

throughout trial.

Plaintiff contended that the Weather Clause was so misleading that the rain on the job site was a surprise. It rains an average of 150 inches per year in Palau. It claimed that standard requirements for constructing earthen embankments specified by the Corps were "defective and impossible." The contractor eventually will complete the road according to the specifications it claims were impossible. The Embankment Clause is not defective, and it is not a design specification.

Daewoo's requests for equitable adjustments appear to be based on the difference between the amount plaintiff allegedly thought the job would cost and what it might cost at some time in the future. The contractor hired an expert after having certified and filed its claims. The expert changed Daewoo's method of calculating damages to a "measured mile" approach and reduced the amount of the certified claim by approximately $22 million. In other words, plaintiff asked an expert to review its claim and make recommendations. The expert used a different method of calculating the claim and reduced it by almost one-third. Daewoo did not amend its claims or its complaint, however, or notify the contracting officer of the changes.

We granted plaintiff's request for a rebuttal case after the Government rested. Plaintiff represented that it needed expert assistance from special fraud counsel and forensic accountants for its rebuttal case. We continued trial based on these representations. Plaintiff's rebuttal case months later did nothing to dispel the conclusion at close of trial that Daewoo's claims against the Government were fraudulent.

B. Fraud Statutes

The Contract Disputes Act requires that an authorized corporate official certify that the contractor's claims are "made in good faith." See 41 U.S.C. § 605(c)(1). "The supporting data must be accurate and complete to the best of [the official's] knowledge and belief, [and] the amount requested [must] accurately reflect[ ] the contract adjustment for which the contractor believes the government is liable . . . ." Id.

Congress provided that claims against the United States must be certified by an authorized corporate official, to "discourag[e] the submission of unwarranted contractor claims." S.Rep. No. 1118, 95th Cong., 2d Sess. 5, reprinted in 1978 U.S.C.C.A.N. 5235, 5239, quoted in Transamerica Insur. Corp. v. United States, 973 F.2d 1572, 1579 (Fed.Cir.1992).[59] Plaintiff's Project Manager, Mr. Kim, certified Daewoo's claim. He testified repeatedly that the claim totaled $64 million. He expected the Government to pay the entire amount.[60]

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[59] The "horse trading" that plaintiff attempted in this case is one practice that Congress addressed by enacting the Contract Disputes Act, including the requirement that responsible individuals in the company certify its claims. See Transamerica Insur. Corp., 973 F.2d at 1579.

[60]Daewoo hired Exponent initially to create a schedule for constructing the road as required by the contract. The consultants remained in Palau to "update" plaintiff's claims using a different method of calculating damages, the measured mile. Mr. Kim knew nothing of the measured mile when he certified the only claim in this case. He did not certify Exponent's work. Exponent did not certify its own work, nor

One of Daewoo's problems in trying this case was its legal arguments. Daewoo alleged in effect that it incurred tens of millions of dollars in unexpected costs because a standard weather clause caused plaintiff to ignore all it knew about working in rainy conditions throughout the world. It argued that the Embankment Clause in the contract is a defective design specification and one or both problems made the job "impossible." These are not credible legal arguments.[61]

Plaintiff argues that it is protected from fraud

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could it have. Plaintiff did not submit a new claim or amend its only certified claim. Daewoo has offered various versions of its total claims, including $64 million, $42 million, $29 million, and $13 million. It has certified only one claim, however, the $64 million claim that it presented to the contracting officer.

[61] Daewoo's arguments at times take on a tone of desperation. A post-trial brief includes the following argument:

> [T]he Government offered no evidence at trial to prove that Daewoo acted with any intent to deceive. In fact, counsel for the Government acknowledged that, at most, Daewoo's inclusion of duplicate equipment was a mistake. Q. I know it was a mistake [referencing to Daewoo's inclusion of duplicate equipment]. What I'm trying to figure out is whether you know how big a mistake it was. You don't, correct? Cowan Tr. at 16541:1-4 (June 27, 2005).

Government counsel apparently was attempting to test Cowan's memory on cross, or his involvement in drafting the claim. Taking such a question from defendant's cross examination entirely out of context, and using it to argue that defendant's intent was to concede the Government's fraud claims, is a tactic that is difficult to characterize.

claims by good faith reliance on experts, citing three cases. Two of the cases involve a defendant charged with criminal tax fraud. The third, according to plaintiff's own parenthetical description, "recogniz[es], but reject[s] based on specific facts, the reliance on expert defense to an FCA [False Claims Act] claim." Counsel believes nevertheless that Daewoo is entitled to expert reliance protection "where the evidence demonstrates that Daewoo fully disclosed all relevant information to its experienced claims expert, Exponent, and subsequently relied in good faith on Exponent's advice."Plaintiff did not "disclose[ ] all relevant information" to Exponent, whose experts wanted to distance themselves from anything Mr. Richardson and Mr. Kim put into the certified claim. We did not have confidence in Exponent's "level of expertise."

Daewoo's experts could have performed an important service by checking plaintiff's books and records concerning operating costs and acquisition costs of equipment. They could have found the duplicated and scrapped equipment in the claim, as Mr. Cotton did. See United States v. TDC Mgmt. Corp., 24 F.3d at 292, 298 (D.C.Cir.1994) ("[E]very party filing a claim before the contracting officer and this court has a duty to examine its records to determine what amounts the Government already has paid or whether payments are actually owed to subcontractors or vendors . . . . [A] failure to make a minimal examination of records constitutes deliberate ignorance or reckless disregard, and a contractor that deliberately ignored false information submitted as part of a claim is liable under the False Claims Act.").

The Government filed counterclaims pursuant to the False Claims Act, the Special Plea in Fraud, and the Contract Disputes Act. Defendant also claimed fraud in the inducement, or "bait and switch,"[62] an unusual counterclaim in this context.

1 Special Plea in Fraud (Forfeiture) – 28 U.S.C. § 2514

"A claim against the United States shall be forfeited to the United States by any person who corruptly practices or attempts to practice any fraud against the United States in the proof, statement, establishment, or allowance thereof." 28 U.S.C. § 2514. The Government must prove such a fraud by clear and convincing evidence. E.g., UMC Elecs. Co. v. United States, 249 F.3d at 1339. The contractor must knowingly present the false claim with the intention of being paid for it. Commercial Contractors, Inc. v. United States, 154 F.3d 1357, 1362 (Fed.Cir.1998). Mere negligence is not sufficient. See Miller v. United States, 213 Ct.Cl. 59, 550 F.2d 17, 22 (1977). Nor are mere inconsistencies or discrepancies, so long as the contractor can offer a reasonable explanation. See McCarthy v. United States, 229 Ct.Cl. 361, 670 F.2d 996, 1004 (Ct.Cl.1982).

The forfeiture counterclaim carries no monetary

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[62] Bait and switch claims usually arise in this court in connection with bid protests. Normally, the Government would waive any concerns that it might have had because the winning contractor would be the bidder alleged to have acted improperly. The Government here alleges fraud in the inducement as a counterclaim.

penalties other than the forfeiture itself. We found no liability against the Government on plaintiff's claim, so Daewoo has nothing to forfeit. Defendant made the necessary showings of intent and otherwise met the elements and the burden called for by this section, however. For example, defendant showed by clear and convincing evidence that the contractor knowingly presented a false claim with the intention of being paid for it.[63] Once these standards and burdens are established, this court must forfeit plaintiff's entire claim. "In such cases, the United States Court of Federal Claims shall specifically find such fraud or attempt and render judgment of forfeiture." 28 U.S.C. § 2514 (emphasis added).

2. CDA Fraud Statute

The Contract Disputes Act includes a fraud provision:

> If a contractor is unable to support any part of his claim and it is determined that such inability is attributable to misrepresentation of fact or fraud on the part of the contractor, he shall be liable to the Government for an amount equal to such unsupported part of the claim in addition to all costs to the Government attributable to the cost of reviewing said part of his claim.

41 U.S.C. § 604.

"Misrepresentation of fact" is defined in the Act

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[63] Evidence of this fact includes the testimony of Mr. J.W. Kim, the corporate official who certified the claim to the contracting officer.

as "a false statement of substantive fact, or any conduct which leads to a belief of a substantive fact material to proper understanding of the matter in hand, made with intent to deceive or mislead." 41 U.S.C. § 601(7). The Government's burden is to "show that the contractor made false or fraudulent statements in the claim that was submitted, with intent to deceive or mislead the Government." Commercial Contractors, 154 F.3d at 1362.

This statute applies if the contractor has submitted the claim under false pretenses or in an attempt to deceive the Government.

> This subsection is included out of concern that the submission of baseless claims contribute to the so-called horsetrading theory where an amount beyond that which can be legitimately claimed is submitted merely as a negotiating tactic. Hence, payment of such a claim by the Government would constitute a windfall to the contractor.

Senate Report No. 95-1118.

The Federal Circuit observed that "the statute does not prescribe a standard of proof [but] the 'preponderance of the evidence' standard has been applied in the past, and we agree that the traditional civil standard is appropriate here." Commercial Contractors, 154 F.3d at 1362 (citations omitted). The Government proved by any standard that Daewoo's $64 million claim was fraudulent. Plaintiff made the claim for purposes other than a good faith belief that the Government owed Daewoo that amount. Plaintiff in fact did not believe that the Government owed it $64 million as a matter of right.

The Project Manager testified at one point that Daewoo filed at least $50 million of the claim to indicate "the seriousness of the situation" and to get the Government to "pay attention" so it would agree to a cheaper method of constructing embankments. DX 1009 SL 507 (Notice Letter); Tr. 679-80 (Cowan); Tr. 9544-45, 9549-50, 9575-77 (J.W. Kim). If so, this is further evidence of bad faith. It means that Daewoo submitted a certified claim as a negotiating ploy; that is, for a reason other than an attempt to recover money for which Daewoo believed the Government is liable.[64]

The CDA fraud provision applies "to the extent a contractor increases the claim submission by the fraudulent addition of items or costs or by misrepresenting its claim items or costs." Senate Report No. 95-1118. Congress expressed concern that the statutory penalty permitted by the False Claims Act, the same amount per claim irrespective of the amount, may not be a sufficient deterrent for large claims. Its intent therefore was, "the larger the fraud attempted, the greater is the liability to the Government." Id. Daewoo's entire $64 million claim was an attempt to defraud the United States.

3. False Claims Act-31 U.S.C. § 3729

The Government must prove the elements of a cause of action under the False Claims Act by a

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[64] Mr. Kim confirmed that he understood the significance of certifying a claim to the contracting officer. See Young-Montenay, Inc. v. United States, 15 F.3d at 1043 (holding that paragraph (3) is met where a corporate official admitted fraud under oath).

preponderance of the evidence. See 31 U.S.C. § 3731(c). Defendant must establish that (1) the contractor presented to the United States a claim for payment; (2) the claim was false or fraudulent; (3) the contractor knew the claim was false or fraudulent; and (4) the United States suffered damages as a result of the false or fraudulent claim. Young-Montenay, Inc. v. United States, 15 F.3d at 1043 (quoting Miller v. United States, 213 Ct.Cl. 59, 550 F.2d 17 (1977)).

"Knowledge" includes deliberate ignorance of the truth or reckless disregard of the truth, and in that case no proof of specific intent to defraud is required. 31 U.S.C. § 3729(b)(3). Daewoo presented a false claim for payment and knowingly used false records or statements to support the claim. The penalty is $10,000 plus three times the amount of damages. 31 U.S.C. § 3729(a)(3).

"Claim" is defined broadly by the statute to include "any request or demand...for money or property" from the Government. See § 3729(c). Typical examples of false claims in this court are those represented by invoices or similar "claims for payment." Daewoo did not present invoices because the Government made progress payments according to amount of earth moved during a period of time. Because of substantial disagreement regarding the cubic meters of embankment or other earth-moving activities, such as cuts and fills, the Corps had representatives meet with Daewoo employees regularly to agree on such amounts. The Government made progress payments according to these stipulated amounts.

The certified claim itself was false or fraudulent

and plaintiff knew that it was false or fraudulent. Whether the United States suffered damages as a result, however, is a matter that we could not establish. See Commercial Contractors, 154 F.3d at 1371-72 (permitting statutory penalties under the False Claims Act but not treble damages in absence of actual damages) (citing United States v. Dyncorp, Inc., 136 F.3d 676, 681 (10th Cir.1998) (holding "the government need not prove damages to establish liability under the FCA, but can instead recover statutory penalties for a violation even absent any damages."); Young-Montenay, Inc. v. United States, 15 F.3d at 1043;).

4. Fraud in the Inducement-"Bait and Switch"

The Supreme Court ruled in a case from the Court of Claims that the Government could, as a matter of public policy, terminate a prime contractor for default where its subcontractors obtained their jobs by using kickbacks. See United States v. Acme Process Equip. Co., 385 U.S. 138, 87 S.Ct. 350, 17 L.Ed.2d 249, (1966). The prime contractor had no knowledge of the kickbacks and was not involved in any illegality. The Court found that the United States nevertheless should be able to rid itself of prime contracts tainted by kickbacks. Id. The Court added,

> [E]ven if the Government could isolate and recover the inflation attributable to the kickback, it would still be saddled with a subcontractor who, having obtained the job other than on merit, is perhaps entirely unreliable in other ways. This unreliability in turn undermines the security of the prime

> contractor's performance-a result which the public cannot tolerate . . . .

Acme Process, 385 U.S. at 144-45, 87 S.Ct. 350 (emphasis added). The facts of this Supreme Court case are different from ours, but its ruling is significant. The Government was permitted to terminate the prime because of the taint of illegality related to the contract. The Government, and indirectly the American people were not required to be "saddled" with contractors who used illegal means to win their contracts. Id. Daewoo is not charged with kickbacks, but it "obtained the job other than on merit." Id. As the Court anticipated, the record shows that Daewoo turned out to be "entirely unreliable in other ways." Id.[65]

Daewoo submitted its final proposal on January 14, 1999, listing key personnel and subcontractors that it would use to complete the contract requirements. The Solicitation required that Daewoo update its technical proposal where applicable. [66]

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[65] The Government does not contend that this statute carries additional monetary penalties, but we noted earlier that it may be considered an analog to the Forfeiture Statute discussed above. That is, penalties do not apply where the contractor could not prove damages. Fraud in the inducement, like any fraud, compromises the legitimacy of a transaction. As the Supreme Court observed, it permits a contractor to "obtain[ ] the job other than on merit." Acme Process, 385 U.S. at 144-45, 87 S.Ct. 350. We included fraud in the inducement in this section because (1) it shows the lengths to which plaintiff was willing to go in pursuing this contract from the early stages; and (2) defendant proved it.

[66] The Government instructed Daewoo as follows: "When you submit your final revised proposal, you will have an

Daewoo did not disclose the changes it had made concerning key personnel, subcontractors, or sequences and methods of work. PX 109 p. 21, 62, 92-96. Plaintiff argued that it was obliged only to provide the Government with management and subcontractors of "equal or greater value"-not necessarily those disclosed in the final proposal. Tr. 9236-9248, 9354-9369 (J.W. Kim); Tr. 3323, 3366-3367 (Hong). However, the right to make that evaluation was the Government's, not the contractor's. Plaintiff knew what it was doing and why. The Corps gave Daewoo high technical scores on its final proposal; this was a major factor in Daewoo's being awarded the contract. Tr. 6127 (Bowen); Tr. 7268-69, 7275 (Kuioka).[67]

i. Mr. Ha

Mr. Ha was an important person to the Corps of Engineers because of his reputation and his previous

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opportunity to make changes (if any) to your price and technical proposals." PX 87 1-2 (Discussion Questions). Daewoo's final proposal contained a section called "Revisions to Technical Proposal" and included a section for revision to "Key Personnel." PX 109 100, 134 (Final Proposal).

[67] Paul Bowen and Gordon Kuioka were members of the Corps' Technical Review Panel. Tr. 6121 (Bowen); Tr. 7133-34 (Kuioka). They testified that the Corps' panel was impressed with Daewoo's experience in performing other road projects in tropical and remote locations of the world. Tr. 7248-75 (Kuioka); Tr. 5619-21, 5827-41 (Bowen); DX 1004. The Corps gave Daewoo a high rating based on its view that key personnel listed in Daewoo's proposal would bring experience and knowledge to construction of the road. PX 64 2-10; DX 1004 63; Tr. 5893 (Bowen); Tr. 7264-66 (Kuioka).

work. His being named Project Manager was a major plus for Daewoo. Mr. Ha's participation gave plaintiff's bid added credit, luster, and weight.

Plaintiff knew that Mr. Ha and others would not be on site for this job, and it deceived the Government by not updating the list of personnel accordingly. Defendant's counsel termed this false pretense. We consider it a part of the fraud. It is a simple yet representative example of plaintiff's fraudulent misrepresentations in connection with this contract and it supports the Government's claim of fraud in the inducement. Despite the possibility that it had a comparatively minor impact compared to other problems, this episode shows that from the beginning, plaintiff was willing to be dishonest.

Daewoo purposely avoided disclosing Mr. Ha's unavailability for this job. Considering the elements of misrepresentation, it is uniquely important to this case; it set the stage: (1) Mr. Ha was well known to the Corps of Engineers; (2) he was so highly regarded that the Corps would give Daewoo extra credit in its evaluation for having Mr. Ha on the job; (3) Daewoo knew how the Corps felt about Mr. Ha and that his presence on the job would assist their bid; and (4) Daewoo knew Ha's unavailability would hurt its bid and purposely omitted mentioning it for that reason.

The score sheet used by the Corps of Engineers in deciding on contract award shows how important plaintiff representations were to the Government. See DX 1004. The reviews gave Daewoo high scores for assets it did not provide. These included key personnel Daewoo said it would assign to the project. PX 64, p. 64 (Technical Proposal); PX 109, 70-90 (Final Proposal); DX 1004 (Source Selection Board

Papers); Tr. 5839-41, 5871-77, 5880-83, 6127 (Bowen); Tr. 7260-66 (Kuioka). Plaintiff also represented that Daewoo would do the earthwork itself and double-shift workers so it could pave concurrently with earthwork.

Daewoo's final proposal listed fourteen "key personnel" as its management for the project on Palau. Only two came. The two who arrived in Palau acted in capacities different from those disclosed in the bid. Tr. 7886-7903 (Morrison).

ii. Daewoo's Subcontractors

Plaintiff was looking for and meeting with subcontractors to perform the earthwork even as it was representing to the Government that it would perform that crucial function itself. Daewoo had accepted bids from OCDC, JungJou, and Putra, none of which plaintiff had disclosed to the Government as potential subcontractors.[68] DX 1022 (OCDC Request for Quotation); Tr. 8634-44, 8842-49 (Yang); Tr. 9816-18 (Calawen); Tr. 9949-50, 10008-09, 10011-12(Lee); Tr. 9250-51 (J.W. Kim).

iii. Sequence and Methods of Work

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[68] This representation was another important factor in the high technical score that the evaluators gave to Daewoo's proposal. Plaintiff submitted other subcontractors as "prospective" in its bid papers, along with substantial amounts of information about each. The Source Selection Board presumably wasted much of its time evaluating the wrong companies for Daewoo's bid. The Corps received hundreds of pages of information about potential subcontractors, but nothing about OCDC, Putra, or JungJou, whose workers would attempt to construct the embankments.

The final proposal represented not only that Daewoo would perform the main earthwork itself, but also that it would work double shifts. Double shifts would enable it to do the paving concurrently with the earthwork. Tr. 3300-14, 3318-20 (Hong); PX 109 (Final Proposal). Daewoo's post-award project plans or schedules did not resemble those disclosed in the bid plan, however. It did not conduct asphalt paving and earthwork concurrently, for example, and it did not run double shifts. Tr. 9295-98 (J.W. Kim). We doubt that it ever intended to. See Tr. 7622 (Morrison); Tr. 13972, 14011-12 (Mathis); Tr. 3560-85, 3685-87 (Hong).

Daewoo disregarded the sequencing established by its Preliminary Work Program and delayed starting work in the northwest section of the project (Package C) until after completing other areas. This created a significant delay in the project. Tr. 14897-14898, 14912 (D'Onofrio). Even before it began working on the embankments, Daewoo's project schedule exceeded the time permitted for completion by the contract. Tr. 14833, 14841-14842 (D'Onofrio); DX 1013, Exhibit # 12 (CPMI report). Daewoo's post-award baseline schedule included seven months of delay due to increases in the time needed for embankment work in all sections, compared to the Preliminary Work Program contained in the Final Proposal. This was partly a result of Daewoo's decrease in planned embankment production from 900 cubic meters per crew per day to 800 cubic meters per day. Tr. 14853 (D'Onofrio); DX 1013

Exhibit F.[69]

Daewoo argued in response to defendant's bait and switch case that the Government waived any rights it had to claim fraud because the Corps knew about the switch. For example, defendant knew that the changes involving management and subcontractors had occurred-once they arrived on site-and did nothing about it. Defendant pointed out that all the Government could do was terminate Daewoo for default, and it has no obligation to terminate early in the process to preserve the Government's rights to claim fraud later.

No additional monetary damages apply, but plaintiff indeed induced the Government fraudulently to award this contract. If plaintiff were entitled to damages, which is not a possibility given the facts of this case, arguably such damages would be forfeited because plaintiff obtained its contract by fraud. In such a manner, fraud in the inducement would be an adjunct to the Special Plea in Fraud. See 28 U.S.C. § 2514. The parties did not argue or brief this issue, however, and we do not address it further.

PLAINTIFF'S REBUTTAL CASE

The response of plaintiff's legal team to the Government's fraud counterclaims was to claim surprise and incompetence. Apparently they had not been listening carefully to their own witnesses.[70]

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[69] Daewoo filed its claim for delay and loss of production based on 1200 meters per crew per day.

[70] In fact, each attorney seemed to specialize in only a discrete portion of the case; lead counsel stated at one point

Witnesses admitted that Daewoo filed a certified claim as a negotiating ploy. They were evasive and contrary on the stand, and they offered testimony that they must have known was not true. Plaintiff's counsel could not explain adequately the various amounts of the claim or how it was calculated. They dismissed potentially serious Rule 11 problems with plaintiff's pleadings as being "inartfully drawn." Their experts failed utterly in their duty to assist the court with a reliable, professional report. We could not rely on their reports or their testimony.

A.

Daewoo's attorneys claimed professional inadequacy in the face of fraud claims, to which they expressed surprise. They moved repeatedly for delays to prepare a rebuttal case. They urged that plaintiff would be impossibly prejudiced if we were to allow the case to end after thirteen weeks. We asked plaintiff to brief the nature of its prejudice, given that the evidence of fraud arose from Daewoo's own witnesses and exhibits. We gave plaintiff's counsel the opportunity to explain why they could not handle such counterclaims, as the evidence was taken from their own case. Such explanations were not clear but

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that he did not know "anything about damages." It is true that counsel were surprised and did not seem to appreciate the fragile nature of their case; it was a mystery that we pondered often during trial. We made an effort to warn plaintiff of the dangers developing in it case, and to urge that counsel resolve the matter with defendant rather than forcing an Opinion of this nature. Rarely does a case of this magnitude provide evidence of fraud so clearly.

plaintiff argued that anything less than adjournment of the trial would result in hopeless prejudice against Daewoo's legal position.[71]

Plaintiff's counsel wanted to return to Washington and present a rebuttal case here, and eventually we agreed. Plaintiff's attorneys represented that they could be ready after arriving home, and would present the rebuttal phase soon thereafter. By then, defendant's counterclaims had been filed for nearly two weeks.

Each of plaintiff's attorneys assured the court repeatedly that they were "not competent" to represent Daewoo now that fraud counterclaims had been filed, so they needed new counsel who specialized in fraud. Daewoo also needed a certified forensic fraud examiner to review the alleged fraud, and they wanted to present fact witnesses to testify regarding Daewoo's "intent." We found all of this far less than convincing. Two members of plaintiff's trial team are highly regarded senior members of a Washington, D.C. law firm that specializes in government contracts. We could not understand the need for additional fact witnesses in the circumstances. Calling some of the same fact witnesses, particularly Mr. Cowan, could be a mistake.[72] We permitted the rebuttal case on plaintiff's terms so long as its counsel assured the

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[71] Three trial counsel for plaintiff represented to the court that they were "not competent" to handle a case containing fraud counterclaims, and that they wished to associate special fraud counsel.

[72] Plaintiff called Mr. Cowan in its rebuttal case.

court that they would not delay upon return to Washington.

Having obtained a continuance and finding itself safely back in Washington, Daewoo asserted that it would be prejudiced by having to put on its rebuttal case right away as promised, and asked for unlimited time for new discovery related to the fraud counterclaims. Its attorneys represented to the court that Daewoo required a certified fraud examiner to testify in the rebuttal case.[73]

One of Daewoo's own experts is a certified fraud examiner. He was familiar with the case, having testified during trial. Plaintiff argued in essence that ethically this witness, Mr. Allen, could not "review his own work," however. Mr. Allen, the Daewoo expert who had been working on this case for more than a year, swore that he could not testify about errors in Exponent's report. The court needed another certified examiner to provide such expert testimony.

B.

Plaintiff filed motions to dismiss and for summary judgment on the CDA counterclaim and the Special Plea in Fraud, and filed an answer to the False Claims Act counterclaim. The Government responded to these motions, and we conducted a trial on plaintiff's rebuttal case in June 2005. Plaintiff did

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[73] Daewoo had presented affidavits from at least two such experts who said they would not be available for the foreseeable future. It was not clear why plaintiff's field of available certified fraud examiners was so limited.

not call a certified fraud examiner during its rebuttal case, but recalled Dennis Allen, the Exponent expert whom counsel assured the court could not "review his own work" when we were in Hawaii.

Daewoo associated special fraud counsel but evidently he served only in an advisory role. He did not participate in the rebuttal case except to examine one witness, an accountant. Plaintiff's original legal team, composed of attorneys who in Hawaii considered themselves "not competent" to handle a fraud case, wrote the briefs and made all the legal arguments. They questioned the witnesses.[74] The rebuttal trial was a mistake from plaintiff's standpoint. Its attempts to address the Government's overwhelming evidence of fraud made matters worse.

Plaintiff argued that it is appropriate to "update" a claim with better numbers. This may be true. See, e.g., UMC Elecs., 43 Fed.Cl. 776 (finding that a contractor was guilty of fraud on all counts where he certified updated claims submitted to the Government). No one certified Daewoo's "updated claims." Plaintiff's experts testified that the $29 million claim was not an update in any event, but a "repriced claim." That is, the experts started over with a repriced claim; they developed new numbers using a new method of calculation, the measured mile. UMC noted, "[w]hen a contractor claims future costs, the contractor must explain its 'estimating

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[74] We have concerns about the behavior of plaintiff's counsel in these respects and others, and expect that they will wish to offer explanations to the court at an appropriate time.

process,' including any 'judgmental factors' applied and'contingencies.'" Id. at 803. That court emphasized, "a contractor may claim future expenses; however, when a contractor submits a claim that includes future expenses, projected costs should be in good faith and in compliance with the FAR, and identified as not yet incurred." Id. (citing 48 C.F.R. § 15.804-6). See also 48 C.F.R. § 31.001 (defining "actual costs" and "costs incurred, as distinguished from 'forecasted costs' ").

Plaintiff cites Tecom and J.F. Shea for the principle that increases or decreases in the amount of a claim need not be recertified "where the essential elements or nature of the previously certified claim remains the same." Tecom v. United States, 732 F.2d 935, 937 (Fed.Cir.1984); J.F. Shea, 4 Cl.Ct. 46.

The Tecom court held that an uncertified monetary claim properly considered by the Contracting Officer because it was less than $50,000 at the time, did not have to be recertified when the amount increased to exceed $50,000 by the time it got to court, where the increase was reasonably based on further information. Tecom, 732 F.2d at 937. Plaintiff continues, "this court has held that a contractor must only certify 'a claim in the amount it then honestly believes is due and that the data furnished at the time of certification are accurate and complete to the best of [the contractor's] knowledge and belief.' J.F. Shea v. United States, 4 Cl.Ct. at 54 (citation omitted). Daewoo did exactly that."

That did not happen in this case. Plaintiff did not honestly believe that the Government owed it the various amounts stated when it certified the claim. Daewoo raises distinct issues in any event.

Defendant has not argued that we have no jurisdiction to hear plaintiff's case, or otherwise questioned whether the second claim is "new" for purposes of the Contract Disputes Act. No one has suggested that the uncertified claim must be returned to the contracting officer for decision. J.F. Shea held that the plaintiff in that case "[had] not presented a new claim . . . . Shea has merely presented additional evidence pertaining to damages springing from that same factual claim. Thus, there is no jurisdictional bar to considering the increased claim . . . ." J.F. Shea, 4 Cl.Ct. 46 (citing Spradlin Corp. ASBCA No. 23974, 81-2 BCA ¶ 15,423 at 76,430-31, 1981 WL 7163). The court noted:

> as litigation in this court includes pretrial proceedings, including discovery, it must be recognized that additional facts may be developed which could increase or decrease the amount of a claim. It would be most disruptive of normal litigation procedure if any increase in the amount of a claim based upon matters developed in litigation before the court had to be submitted to the contracting officer before the court could continue to a final resolution on the claim. In this circumstance, it has been ruled that, after certification is complete, a contractor is not precluded from changing the amount of the claim or producing additional data in support of increased damages.

J.F. Shea, 4 Cl.Ct. at 54 (citing Newell Clothing Co., ASBCA No. 24482, 80-2 BCA ¶ 14,774 at 72,916, 1980 WL 2896). This case is not about jurisdiction but about fraud. The only certified claim in this case

totals nearly $64 million. The issue is whether that claim or any part of it is fraudulent.

Plaintiff states, "[t]he Government argues that a problem exists because-without citation to any law contrary to J.F. Shea-Exponent used a different pricing methodology. Evidence at trial established, however, that Exponent's damages analysis more precisely identified causes of delay based on the only day-by-day schedule analysis undertaken by either the Government or Daewoo."

This does not address the problem, of course, even if true. The issue the Government raised was not whether the measured mile is a better approach, but whether it is a different approach. Plaintiff is attempting to reduce its damages exposure by reducing the amount of its claim. Daewoo argues that it did not reduce the claim as a result of Exponent's participation by more than $20 million as the Government had pointed out, but "the claim actually increased from $13 million to $29 million as Daewoo incurred additional costs subsequent to submission of the claim and utilized an improved calculation methodology." Plaintiff used an entirely different method of calculating the claim, the measured mile, and its experts testified that they did not update the claim but "repriced" it. They calculated a new, different claim.

Plaintiff urges that "a contractor is not precluded from changing the amount of the claim or producing additional data in support of increased damages [after certification]. A plaintiff must be precluded, however, from raising any new claim before this court which was not previously presented and certified to the contracting officer for decision." Whether

Exponent's claim was an increase from $13 million to $29 million or a decrease from $64 million to $42 million, it was "repriced" according to plaintiff's own experts. They disclaimed any knowledge of the certified claim, avoiding any testimony that might suggest they had even seen the numbers. This repriced or updated or new claim was not certified by Mr. Kim or anyone else.

Mr. Kim was the project manager who certified the "real" claim, and his knowledge of the data supporting Exponent's version of the claim was very limited, according to the witness. The only certified claim in this case is the March 29, 2002 claim for $64 million, which no one at Daewoo acknowledges now. They adopt instead Exponent's $29 million or $42 million uncertified "update."

ADDITIONAL MATTERS

A. The Complaint

Plaintiff disposes of problems with its inflated claim by asserting, "the alleged errors in Daewoo's claim constitute merely inadvertent or immaterial mistakes." The same information in Daewoo's Complaint is "inartfully drawn." In fact, Daewoo criticizes the Government for "refus[ing] to let the matter go [that is, the inflated claim in the Complaint], and has attempted to capitalize on arguably poor draftsmanship in the Complaint." Thus, plaintiff dismisses the Complaint before this court, certified in accordance with Rule 11 by an officer of this court, as "inartfully drawn," and "confusing," the result merely of "poor draftsmanship." Rule 11 provides that an attorney who signs pleadings and files them in this court

certifies that "claims are warranted by existing law, to the best of the [attorney's] knowledge, information and belief, formed after an inquiry reasonable under the circumstances." Such claims must be "likely to have evidentiary support." See RCFC 11.

Plaintiff complains that despite this explanation, the Government "mischaracterize[s] Daewoo's claim as one for $64 million. [T]he evidence clearly demonstrates that Daewoo certified a claim for approximately $13.4 million, with a projection of potential future costs." According to plaintiff's counsel, the "certified claim itself is clear, the confusion on this subject is due in part to the language of the Complaint, even though any such confusion was clarified." Daewoo has not amended its Complaint, however, so counsel thinks that the court should do that now: "[T]o the extent the Complaint may have confused this issue, the Complaint should be deemed amended to conform to the evidence . . . ." (citing RCFC 15(b)). "Fraudulent intent . . . cannot reasonably be inferred from the poorly explained portions of the Complaint (i.e., Paragraph 32 and the Prayer for Relief at the conclusion of the Complaint)."

B. The Manual

The Corps of Engineers provides a Construction Equipment Ownership and Operating Expense Schedule showing average ownership and operating rates for construction equipment. Its purpose is to supply costs of acquisition or operation in default of better information from a contractor's books and records. Using the Manual is improper, however, where its purpose is to inflate the amount of a claim. That happened here.

Defendant showed that Daewoo had equipment acquisition and maintenance costs in its records, but no one chose to compare the records with the Manual to see if the acquisition costs were less than those set out in the manual. If they did, they discovered that the manual rates were higher and ignored the records. In other words, plaintiff purposely avoided looking at its own acquisition costs in favor of the higher manual numbers. This intentional inflation of the claim is fraud.[75] Daewoo also applied the manual rates improperly and inconsistently.[76]

It should be difficult for plaintiff to argue that it did not know to use actual acquisition and operation costs if it had them, or that it thought the contract required use of the Manual.[77] Common sense suggests that businesses should use numbers available to them in favor of manuals showing

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[75] Use of the Manual is not per se improper. Daewoo could have used the schedule for either the acquisition or operating expense if actual costs were unavailable. The Manual's use would have been proper for equipment that lacked records. Plaintiff could have used the Manual for operating expense and used actual records for acquisition. It was not necessary to use all-Manual or all-actual costs. Plaintiff did not consider its records because the Manual rates were higher.

[76] Exponent adjusted rates based on the age of its equipment and in some cases adjusted for equipment used beyond a standard forty-hour week. It did not adjust rates for changes in the cost-of-money rate or changes in fuel and maintenance costs, however.

[77] Plaintiff's justification for arguing the Manual was required by contract is, needless to say, selective. Use of the Manual in connection with the Coral Dredging delay claim was understandable, as Daewoo had not yet mobilized fully.

industry averages. Moreover, the Manual itself instructs contractors to use actual costs when available.[78]

Daewoo's choice of manual rates over actual costs created an inflated claim, as rates used in the Manual are generally higher than actual costs. The Government does not encourage the use of manual rates because contractors would be tempted to avoid recording actual costs. Such a practice has the effect of inflating claims, but it results in bad business practice as well.

Plaintiff's experts did not verify or question inconsistencies in the information provided by its client, Daewoo.[79] For example, Exponent used the

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[78] See, e.g.,48 C.F.R. § 31.105(d)(2)(I):

> (i) Allowable ownership and operating costs shall be determined as follows:
>
> (A) Actual cost data shall be used when such data can be determined for both ownership and operating costs for each piece of equipment, or groups of similar serial or series equipment, from the contractor's accounting records. When such costs cannot be so determined, the contracting agency may specify the use of a particular schedule of predetermined rates or any part thereof to determine ownership and operating costs of construction equipment . . . .
>
> (emphasis added).

[79] If Exponent had made such an inquiry, and we assume it was not complicit in plaintiff's fraud, Daewoo's experts could have performed an important service by checking plaintiff's books and records concerning operating costs and acquisition costs of equipment. They could have found the duplicated and scrapped equipment in the claim, as Cotton did. See TDC Mgmt. Corp., 24 F.3d at 292, 298 ("[A] failure to make a

incorrect production rate of 1200 cubic meters per crew per day to calculate Daewoo's claim. Plaintiff bid on the basis of 900 cubic meters of earthwork per crew per day. It used the Corps' manual or book rate for all acquisition costs of machinery and equipment when actual costs were readily available and far lower. Exponent corrected its errors only after government experts pointed them out. Some of the corrections were made during trial, in one case on the morning of the experts' testimony. None of Exponent's errors explained in the Cotton Report reduced the amount of plaintiff's claim; all had the effect of increasing the claim.

Plaintiff included scrapped equipment in the claim and equipment that had been depreciated beyond its cost. Daewoo generally applies a four-year depreciation system for its equipment. Some of the equipment had been fully depreciated before the Compact Road Project began. Daewoo inflated the number of hours used daily on certain equipment, including a Jeep used by the Project Manager. Daewoo's claim states that Mr. Kim used his Jeep forty hours per week, calling for him to drive around the job site eight hours per weekday.[80]

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minimal examination of records constitutes deliberate ignorance or reckless disregard, and a contractor that deliberately ignored false information submitted as part of a claim is liable under the False Claims Act.").

[80] Some of the sources for these and other errors are in the Cotton Report (DX 1015); they may be summarized as: Overstated costs - e.g., Exponent applied a $121 per month standby rate for plaintiff's use of a Skil Saw. PX 304, 255-392 (Certified Claim); PX 252, (Indirect Overhead); Tr. 10427-31

Exponent did not always use manual rates that applied to equipment used in the claim. It should have used the rates for 1999 and 2000. Instead, plaintiff used rates for 2003 for some of its claim. This inflated plaintiff's claim.[81]

(Song); Tr. 13240-45, 13405-07 (Allen). Depreciating vehicles beyond original acquisition costs - Nissan pathfinder (PX 304, 264-392) (Certified Claim); DX 1015 18-20 (Cotton Supplemental Report); Tr. 13389-13405 (Allen). Claiming costs for scrapped and duplicated equipment - DX 1015 (Cotton report); Tr. 15250, 15253-15255, 15274-15275, 15279, 15282, 15285-15286, 15290, 15293, 15296-15298, 15300-15301, 15303-15306, 15316, 17498-17499, 17501, 17509, 17522-17526, 17532-17535 (Cotton); DX 1015 (Cotton Supplemental Report). Claiming unallowable items - e.g., interest costs and entertainment costs-DX 1015 (Cotton Report); DX 1015 (Cotton Supplemental Report); Tr. 17561-62 (Hadley).

[81] Plaintiff used the Manual inconsistently. Exponent chose manual rates based on the 2001 Schedule for the "measured mile" inefficiency claim, and it used the 1999 and 2001 Schedules (inconsistently) for the disruption portion of the claim. Exponent admitted that it did not use the rate schedules consistently. Its report states "in general the subset B equipment [2002 and 2003 direct costs] is from the 2001 book and the subset A equipment [2000 and 2001 direct equipment and 2002 and 2003 indirect equipment] is from the 1999 book. A few items in subset A have been priced copying the rates from 2001." Exponent's Report states, "in our work, the subset A equipment was identified by Daewoo. The subset B used essentially the same descriptions and was ID'd by Exponent, reaching different rates in some cases. For those pieces with vastly different rates, we requested Daewoo to relook at the piece and the Corps book to confirm the Corps' ID which was closest to the actual piece of equipment . . . . As was expected, in some cases, Daewoo confirmed our ID, in some cases, their ID, and in some cases chose a new ID. Though we were able to incorporate the changes into the subset B equipment, we

We noted that all Daewoo's "errors" in the claim increased the amount of the claim; no errors had the effect of reducing the claim. This would be a remarkable coincidence in a random review of claim elements, or any means of "sampling" by auditors. See, e.g., DX 1015 (Cotton Report); DX 1015 (Cotton Supplemental Report); Tr. 17303 (McGeehin). The possibility that the inflationary effects of Exponent's and Daewoo's errors resulted from innocent mistakes is remote.

Instead of determining actual equipment costs and using these costs in the claim calculations, Exponent used equipment rates contained in the 1999 and 2001 editions of the Manual. Both editions state:

> This pamphlet applies to all USACE commands. It is applicable to all Solicitations and contracts for construction expected to exceed the Simplified Acquisition Threshold of $100,000 when actual costs data for both ownership and operating costs cannot be determined . . . . [T]he use of this pamphlet will be required by contractors for pricing contractor owned equipment in negotiated procurement when: (1) Cost or pricing data as defined in FAR Part 15 is not required. (2)

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estimated some subset A equipment using the subset B rates."

> Cost or pricing is required and the actual costs data to support either ownership or operating costs for equipment or equipment groups of similar model and series is not available.

EP 1111-1-8, Construction Equipment Ownership and Operating Expense Schedule, Region XII (Kwajalein Island) (emphasis added).

Daewoo's subcontractors provided actual equipment costs to the Government. Many of the unallowable and unsupported costs included in Daewoo's claim had been identified and removed by DCAA in an earlier claim, but were added again to this claim. Re-claiming costs that were rejected in an earlier claim as unallowable is further evidence of bad faith.

C.

Congress passed the Contract Disputes Act in part to encourage bidders on government contracts to submit reasonable and responsible proposals in response to invitations for bid. A contractor's completing the project and making a profit serves the interests of both parties. Other rationales of the Contract Disputes Act are a reasonable hope of quality work on the job, and simple fairness. This case shows that an important function of the Act is to insure fairness not only to the Government, but also to other bidders.

Other bidders on this job did their homework, made reasonable offers, and perhaps could have finished the job on time without the need for litigation. They didnot have the opportunity to try. They recognized the difficulties of producing a road

fifty-three miles long on a tropical island with mountainous terrain and persistent rain. Their pre-bid studies showed that soils on the island would not compact easily, and they added the costs of supplemental materials to assist their efforts. In short, they knew that it was an expensive job and they bid accordingly.

The Government had urged contractors in the bidding process to exercise "creativity and flexibility" in meeting the difficult time and climate restrictions they would find on Palau. Some bidders would have used blended rock to address the compaction problem, an expensive alternative. Others proposed using lime, or scrapers. Plaintiff did not attempt any of these methods. Only Daewoo thought that it could accomplish required compaction by what was referred to during trial as a "dig and dump method." That is, plaintiff thought that it could simply pick up the dirt and dump it on the embankments.[82]

Responsible bidders lost the Palau contract to Daewoo because of their prudence.[83] It may not be a

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[82] Plaintiff's counsel commented during his opening statement, "this moving of the dirt, spreading it out, mixing it up, and running over it with a roller to get compacting is not rocket science. It's something that this contractor, its subcontractors, and virtually every other road building subcontractor in the world does day in/day out."

This may explain Daewoo's attitude in preparing its bid and planning the job once it was awarded the contract. Other contractors understood how difficult this job would be, and bid accordingly.

[83] Daewoo emphasized repeatedly how difficult this project was because of the technical aspects and other problems, such

coincidence that plaintiff is seeking equitable adjustments in this litigation that approximate the amount by which Daewoo was able to undercut more careful bidders.

D.

Plaintiff responded to the Government's concern about its low bid by acknowledging that the bid was unrealistic because, "in reality [the contract] cannot be achieved [at the bid price] due to the amount of time required for drying/aerating, the cohesive soils, settlement criteria for embankment construction, and the constant threat of rainfall virtually every month of the year." This shows that Daewoo knew as well as everyone else how difficult this job would be.[84] It

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as weather. Such arguments only explain many of the comments of other bidders concerning the difficulty of the job and the extent to which plaintiff underbid the contract. Plaintiff knew or should have known when it bid the contract that this would be an extremely difficult project.

[84] If that were not sufficient, the Government's designers and geotechnical advisors warned of difficult conditions to anyone who would bid on this project. Geolabs issued final Geotechnical Engineering Reports for each of the Packages in July 1998. The Executive Summary for each of the four geotechnical reports contained the following disclosure:

> Due to the high in-situ moisture content of the on-site soils, substantial aeration of the high moisture soils will be required in order to achieve the normal 90 percent compaction requirement and may not be feasible due to the year-round high rainfall experienced at the project site. As a result, the compaction requirements for general fill placement will have to be reduced in order to aid in the earthwork construction using the high moisture content tropical

soils in this wet environment. Based on our engineering analyses, we believe that a compaction requirement of a minimum 85 percent relative compaction may be used for this project.

Our laboratory test results indicate that the in-situ saprolite soils or compacted fills composed of the same materials generally exhibit relatively low CBR values in a very moist to wet condition. Strengthening of these subgrade soils with the inclusion of additives, such as lime treatment, and/or the incorporation of ground stabilization fabrics at the subgrade level, may be required prior to pavement construction and/or to facilitate earthwork construction with the very high moisture soils.

The Geotechnical Reports also included "Fill Placement and Compaction Requirements":

Since the project site is located in a high rainfall area and the on-site materials generally have high in-situ moisture contents ranging from about 50 to over 80 percent, which is approximately 20 to 50 percent above the optimum moisture content, significant drying of the excavated materials will be required prior to their use as fill and/or backfill material in order to meet the normal 90 percent minimum compaction requirement.

As mentioned earlier, substantial aeration of the in-situ soils may not be feasible due to the high rainfall environment at the project site. Based on past project experience in Palau and our experience with similar high moisture tropical soils, we believe the compaction requirement for general fill placement for this project may be reduced from the standard 90 percent to a minimum of 85 percent relative compaction.

. . .

Even with the reduced 85 percent minimum compaction criteria, we believe that some moisture reduction would still be necessary, especially for the materials generated from the deep excavations where

focused at the beginning on the same issues that it would complain of later. Plaintiff's complaints about the weather and the soils of Palau therefore rang hollow.

E.

Daewoo complained that the Government and its experts picked out small issues that did not make much difference in the bottom line. These minor differences added up, however, and they showed that plaintiff was willing to commit fraud. Plaintiff was willing to inflate its claim wherever and whenever it could, even in amounts that were relatively small. See, e.g., Cotton Report, p. 20: "Exponent rounded the percentage-to-completion factor from 44.453% upward to 45%. That rounding error alone results in a claim overstatement of approximately $131,000."

Exponent added unallowable and unsupported costs in the claim. These included alcohol, donations to Palau, and entertainment, for example. Daewoo also claimed interest on its letter of credit. Costs of financing are not allowable. See 48 C.F.R § 31.205-20. Daewoo claimed financing costs of more than $12,000 in the certified claim.

DAMAGES

Daewoo did not prove liability. Plaintiff's claim is fraudulent. The issue with regard to damages is how to measure plaintiff's fraud. The Contract Disputes Act fraud provision states, "[i]f a contractor is unable to support any part of his claim . . . [because of]

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the in-situ moisture contents may be in excess of 65 to 70 percent.

misrepresentation of fact or fraud on the part of the contractor, he shall be liable to the Government for an amount equal to such unsupported part of the claim." 41 U.S.C. § 604.

The "part of [the] claim" that is fraudulent without question is $50,629,855.88. Plaintiff's authorized official certified this claim and presented it to the contracting officer as costs "to be incurred after December 31, 2001." The certifying official, Mr. Kim, testified that he submitted the claim to get the Government's attention. He wanted the Corps to know how much it would cost the Government if Mr. Morrison did not approve the new compaction method that plaintiff preferred. Plaintiff's counsel acknowledged that Daewoo's purpose was to insure that the Corps would approve the new method sooner rather than later. "Daewoo's suggestion that the Government expedite a previously approved and validated alternative embankment placement method is a reasonable request that served the projects best interests . . . ." Daewoo used a certified claim to "suggest" that the Government change the method of compaction required by the contract that plaintiff bid on and won, to save plaintiff money.

Plaintiff attempted during trial to show that the claim was some lesser amount, apparently sensing this outcome. Daewoo did not certify a lesser amount to the contracting officer, however; the Government observed that Daewoo could not "cure" a fraudulent claim in any event. After the contracting officer denied plaintiff's claim, Daewoo filed a complaint in this court seeking the entire $64million. The contracting officer's denial of that claim is the basis for our jurisdiction.

Daewoo swears in the certified claim that defendant owes $13,348,793.07 for its added costs caused by the Government through December 31, 2001, "and costs to be incurred after December 31, 2001 in the amount of $50,629,855.88, for a total monetary damage claim of $63,798,648.95." See Complaint ¶ 32.[85] (emphasis added). We suspect that Daewoo's entire claim is fraudulent. However, plaintiff's apparent incompetence in putting together its claim, along with the unwillingness of its witnesses to explain the process, provides it an ironic benefit. That is, we found it difficult to locate the line between fraud and mere failure of proof in this case.

It is theoretically possible that plaintiff's $13 million claim represents an amount that it could have incurred because of defective specifications, had such a theory been applicable, but plaintiff could not prove it because it employed the wrong legal theories and its witnesses were not credible. For these reasons, we limited findings of fraud to the $50 million claim that clearly is fraudulent.

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[85] Paragraph 32 of the complaint recites the damages included in its March 29, 2002 certified claim to the contracting officer. The complaint effectively incorporates the claim by reference, describing the claim as having "requested damages for the added costs incurred from October 13, 2000 through December 31, 2001, in the amount of $13,348,793.07 and for the added costs incurred and to be incurred after December 31, 2001, in the amount of $50,629,855.88, for a total monetary damage claim of $63,798,648.95." Daewoo's claim also included a request for an additional 928 calendar days to complete the contract work "resulting from delays beyond Daewoo's control and without its fault or negligence."

Witnesses including Mr. Kim testified that the extra $50 million claim was a means to get the Government's attention, and to show the Government what would happen if it did not approve the new compaction method that plaintiff wanted. Daewoo did not file that part of the claim in good faith; it was not an amount to which plaintiff honestly believed it was entitled. Whether Daewoo wanted the money or wanted the Government's attention, $64 million was not an amount the Government owed plaintiff at the time of certification, and plaintiff knew it.

CONCLUSION

Daewoo violated the False Claims Act by knowingly submitting false or fraudulent claims; it violated the Contract Disputes Act through its submission of false or fraudulent claims with an intent to deceive or mislead the government; and it attempted to practice fraud against the United States "in the proof, statement, establishment, or allowance" of its claims. 28 U.S.C. § 2514. These findings are supported by testimony of plaintiff's witnesses and other evidence produced by plaintiff and defendant. Plaintiff's claim to the contracting officer and its complaint in this court sought a "total monetary damage claim" of $64 million, an amount that Daewoo's own witnesses, experts, and attorneys abandoned before the trial was over.

The Cotton Company Report and defendant's examinations of plaintiff's witnesses together are sufficient to establish plaintiff's fraud. Testimony of Mr. Richardson, Mr. Cowen, Mr. Stone, Mr. Kim, plaintiff's experts, and others show that plaintiff filed its claim in bad faith. The Government's examinations of these witnesses was patient and fair,

yet their testimony was evasive and non-responsive, contradictory, confusing, and untrue.

Daewoo's arguments regarding the Weather Clause and the embankment work and its testimony regarding compaction problems and its calculation of the bid, spotlight plaintiff's attempt to accomplish the improper result that Congress addressed by enacting the certification and fraud sections of the Contract Disputes Act. Plaintiff's plan to win the contract with an unrealistically low bid, then profit through demands for equitable adjustments is not necessarily fraudulent per se, within the meaning of the statutes included here. By its bidding scheme, however, plaintiff was successful in shutting out legitimate contractors that likely could have handled this job as the Corps of Engineers planned it.[86]

Plaintiff's inability or lack of interest in completing this job properly was evident throughout contract performance. Plaintiff cannot blame the Government for its failures, but only itself and its subcontractors. The Corps' lenient approach in response to the contractor's demands apparently was a hope to salvage the project within a reasonable time. The Government made every accommodation.

Daewoo obtained this contract under false pretenses, though we have not attempted to assign damages to the Government's claim of fraud in the

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[86] We recognize that these and other conclusions are harsh, but evidence to support them is manifest in the record. We urged plaintiff repeatedly before and after trial to resolve this matter and avoid this result, because the likelihood of this outcome was apparent then.

inducement. It submitted false records and made false statements in preparing, certifying, and pursuing its claim and subsequent "updates." Defendant lists a number of instances in which plaintiff made false statements to the Government to further its ambitions or to obtain money or property ultimately. Some are related to the Bait and Switch tactics discussed above. Others include the following:

> Alleging compaction requirements were "impossible" when plaintiff's own records showed otherwise; alleging the earthwork could not be done in the time allotted when a subcontractor had been successful doing it; using 1200 cubic meters as its bid-based production number when the truth was available within its operations; overstating the "cost of more than 700 items of equipment in its claim [and] 27 items of scrapped equipment; and using the certified claim as a negotiating ploy . . . .

We agree that these are "false claims" in the sense that they are untrue and Daewoo knew or should have known better. Whether they are separate claims for purposes of the $10,000 statutory penalty under the False Claims Act is less certain. Some seem duplicative of or encompassed by other penalties, though this would not necessarily be disqualifying. The fraud statutes are cumulative and not in the alternative. The definition of "claim" in the False Claims Act is broad. See § 3729(c) (defining "claim" as "any request or demand . . . for money or property' from the Government."). These claims would add $7,620,000 to the damages, at $10,000 per claim. The parties have not briefed or argued this

issue; for that reason we decline to enter judgment based on multiple counts at this time.

Daewoo filed at least $50 million of the claim in bad faith. We enter judgment and costs for defendant pursuant to the Contract Disputes Act, based on that amount. See 41 U.S.C. § 604. Defendant's costs related to the CDA counterclaim were estimated to be $4,000,000 near the end of trial. We granted a motion to compel during trial, which mandates costs of less than $2,000.[87]

Plaintiff's motions to dismiss and for summary judgment on the Contract Disputes Act counterclaim and the Special Plea in Fraud are DENIED. We enter judgment for defendant on its counterclaims pursuant to the Contract Disputes Act, the Special Plea in Fraud, and the False Claims Act as follows:

Contract Disputes Act-$50,629,855.88.

False Claims Act-$10,000.

Special Plea in Fraud-No monetary judgement.

There being no just reason for delay, the Clerk of Court will enter partial final judgment according to RCFC 54(b) for defendant in the amount of $50,639,855.88, plus interest as applicable. Costs to defendant.

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[87] Costs authorized by the Contract Disputes Act and sanctions are subject to accounting. Counsel will confer and advise the court as soon as possible but no later than October 23, 2006 whether they will stipulate an additional judgment on such costs.

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(3)

No. 09-3

In the Supreme Court of the United States

DAEWOO ENGINEERING & CONSTRUCTION CO., LTD.,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. 601 *et seq.*, a government contractor may submit a claim for a contract adjustment if the contractor believes the government is liable for an additional amount. 41 U.S.C. 606. The Act provides that, "[i]f a contractor is unable to support any part of his claim and it is determined that such inability is attributable to misrepresentation of fact or fraud on the part of the contractor, he shall be liable to the Government for an amount equal to such unsupported part of the claim." 41 U.S.C. 604. The question presented is as follows:

Whether petitioner is liable under the CDA for the full amount of the part of its claim that was found to be fraudulent without question.

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In the Supreme Court of the United States

No. 09-3

DAEWOO ENGINEERING & CONSTRUCTION CO., LTD.,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-21a) is reported at 557 F.3d. 1332. The opinion of the United States Court of Federal Claims (Pet. App. 22a-153a) is reported at 73 Fed. Cl. 547.

JURISDICTION

The judgment of the court of appeals was entered on February 20, 2009. A petition for rehearing was denied on April 27, 2009 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on June 26, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Contract Disputes Act (CDA), 41 U.S.C. 601 *et seq.*, authorizes federal contractors to seek reimbursement from the United States for additional contract costs that they believe should be the responsibility of the government, and it delineates the process by which such claims must be submitted and considered. 41 U.S.C. 605. When a contractor seeks an amount in excess of $100,000, it must certify that the claim is made in good faith, that the data supporting the claim are accurate and complete, and that the amount requested accurately reflects the amount of money for which the contractor believes the government is liable. 41 U.S.C. 605(c)(1). If a contractor is dissatisfied with an agency's disposition of its claim, it may seek review of such disposition through appeal to either the appropriate board of contract appeals or the United States Court of Federal Claims. 41 U.S.C. 606, 609.

The CDA provision at issue in this case states in pertinent part:

> If a contractor is unable to support any part of his claim and it is determined that such inability is attributable to misrepresentation of fact or fraud on the part of the contractor, he shall be liable to the Government for an amount equal to such unsupported part of the claim.

41 U.S.C. 604.

2. In 1998, the United States Army Corps of Engineers (Corps) solicited bids to build a 53-mile road around the island of Babeldaob in the Republic of Palau. The government estimated that the cost of constructing the road would be between $100 million and $250 million. Petitioner Daewoo Engineering and Construction Co.

submitted by far the lowest bid, estimating the cost of the project at $73 million. After the government questioned the price, petitioner submitted a revised bid of $88.6 million. The government awarded the contract to petitioner. Pet. App. 4a.

The contract specified that the road should be completed within 1080 days (just under three years), beginning in October 2000. Pet. App. 4a. Construction of the road was delayed, however, for reasons that petitioner attributed to Palau's moist soil and humid and rainy weather. *Ibid.* After discussing the delays with petitioner, the government agreed to reduce the amount of soil compaction specified in the contract for certain parts of the road in order to "allow[] increased productivity" on petitioner's part. *Ibid.*; *id.* at 43a.[1]

3. On March 29, 2002, well before completion of the contract, petitioner submitted to the contracting officer a certified claim seeking equitable adjustment pursuant to the CDA. Pet. App. 4a, 50a. Petitioner's claim sought adjustment of the contract price and the time to perform the contract, alleging that "defective" specifications in the contract had misled it and increased its costs of performance. *Id.* at 4a-5a, 50a. The claim sought approximately $13.3 million for costs that petitioner alleged it had already incurred, and an additional $50.6 million for future costs "not yet incurred." *Id.* at 5a, 50a. The Corps denied the claim. *Id.* at 5a, 51a.[2]

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[1] Soil must generally be dry in order to achieve compaction, a task that can prove challenging in Palau's tropical climate. Pet App. 24a-25a & n.2.

[2] In its appeal to the Federal Circuit, petitioner contended that the $50.6 million future-costs component of its claim was not actually a claim, but was merely a projection of costs. Upon consideration of the claim document itself, the testimony of petitioner's claim-certifying

4. Pursuant to 41 U.S.C. 609, petitioner then filed suit in the Court of Federal Claims seeking review of the contracting officer's final decision and requesting an award of approximately $64 million. Pet. App. 5a, 51a. The Court of Federal Claims held a 13-week trial, during which the government filed counterclaims for damages, seeking, *inter alia*, $64 million under the CDA. *Id.* at 23a, 51a, 111a-112a. The Court of Federal Claims concluded that the government had proved "by clear and convincing evidence that [petitioner] knowingly presented a false claim with the intention of being paid for it." *Id.* at 5a-6a (internal citation omitted). The court awarded the government a $50.6 million penalty under the CDA, as well as $10,000 under the False Claims Act and forfeiture of petitioner's claims. *Id.* at 6a.

5. The court of appeals affirmed. Pet. App. 3a-21a. The court upheld the Court of Federal Claims' determination that the $50.6 million future-costs part of petitioner's certified claim was fraudulent and its award of a penalty in that amount. *Id.* at 12a-18a.

The court of appeals explained that petitioner's "damages experts at trial treated the certified claim computation as essentially worthless, did not utilize it, and did not even bother to understand it." Pet. App. 14a. The court further observed that petitioner had made "virtually no effort to show that the Court of Federal Claims' findings of fraud are clearly erroneous." *Id.* at 15a. The court also rejected petitioner's argument that a claim is fraudulent for purposes of 41 U.S.C. 604 only if it rests upon false facts rather than on a baseless

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official, and the text of the complaint filed to begin this lawsuit (which described the certified claim as a "total monetary damage claim of $63,978,648.95"), the Federal Circuit rejected that argument. Pet. App. 7a-12a. Petitioner does not challenge that determination here.

calculation. Pet. App. 16a-17a. The court of appeals explained that Congress had enacted Section 604 "out of concern that the submission of baseless claims contribute[s] to the so-called horsetrading theory where an amount beyond that which can be legitimately claimed is submitted merely as a negotiating tactic." *Id.* at 17a (brackets in original) (quoting S. Rep. No. 1118, 95th Cong., 2d Sess. 20 (1978)).[3]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. And while the Federal Circuit has exclusive appellate jurisdiction over suits brought under the CDA, petitioner identifies no basis for concluding that the question presented here arises with any frequency. Further review is not warranted.

1. The court of appeals correctly affirmed both the Court of Federal Claims' conclusion that the part of petitioner's claim for $50.6 million in future costs was fraudulent, and its decision to award a penalty in that amount under the CDA. Section 604 provides that "[i]f a contractor is unable to support any part of his claim" due to "fraud on the part of the contractor, he shall be liable to the Government for an amount equal to such unsupported part of the claim." 41 U.S.C. 604. In this case, the Court of Federal Claims properly awarded a penalty of $50.6 million based on its finding that the future-damages part of petitioner's claim was fraudulent in its entirety.

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[3] The court of appeals also upheld the Court of Federal Claims' determinations that petitioner had violated the False Claims Act and that petitioner had failed to prove its affirmative claims. Pet. App. 18a-21a. Petitioner does not challenge those holdings.

a. Petitioner contends that the Court of Federal Claims found that only "certain specific items" in the future-costs part of petitioner's claim were unsupported, see Pet. 9 (citing Pet. App. 140a n.80), but that the court nevertheless awarded as a penalty the full amount of the future costs that petitioner demanded rather than the amount of the specific unsupported items. That contention reflects a misunderstanding of the Court of Federal Claims' opinion.

The phrase "certain specific items" does not appear on the cited page of the Court of Federal Claims' opinion, but rather in the opinion of the court of appeals. See Pet. App. 12a n.5. Moreover, the court of appeals used that phrase to describe the findings of a government-retained expert, not the findings of the Court of Federal Claims. See *ibid.* The Court of Federal Claims noted that "[s]ome" of the sources of specified errors in petitioner's claim, as well as "other errors," were identified in that expert's report. *Id.* at 140a n.80. The court did not suggest, however, that the specific errors identified in the expert report represented the universe of errors in petitioner's claim, let alone the sole basis for the court's finding of fraud.

On the contrary, the Court of Federal Claims stated repeatedly that it found the future-damages part of petitioner's claim—*in its entirety*—to be fraudulent. The court first concluded that petitioner's "entire $64 million claim was an attempt to defraud the United States" because petitioner "in fact did not believe that the Government owed it $64 million as a matter of right." Pet. App. 119a-120a; *id.* at 121a-122a ("The certified claim itself was false or fraudulent and [petitioner] knew that it was false or fraudulent."). In considering how to measure damages, the court concluded that "[t]he 'part of

[the] claim' that is fraudulent without question is $50,629,855.88," the part of petitioner's claim relating to alleged future damages. *Id.* at 148a (second brackets in original). The court noted that petitioner's own witnesses, including the official who had certified the claim, testified that the purpose of the future-damages part of the claim was to get the government's attention and to pressure the government to accede to petitioner's demands. *Id.* at 148a, 150a. Although the court suspected that the part of petitioner's claim relating to past damages was fraudulent as well, it did not assess a penalty for that amount because "it [was] difficult to locate the line between fraud and mere failure of proof" as to that portion of petitioner's claim. *Id.* at 149a. Instead, because the court had no doubt that the $50 million future-damages part of petitioner's claim was not submitted in good faith and did not represent "an amount to which [petitioner] honestly believed it was entitled," the court properly assessed a penalty for that amount. *Id.* at 150a.

Because the lower courts found that the $50.6 million future-damages part of petitioner's claim was fraudulent in its entirety, and because petitioner does not directly challenge the factual findings on which that conclusion is based, the question presented in the petition is not actually implicated here. Contrary to petitioner's contention, the Court of Federal Claims did measure the penalty by the "amount by which the claim is found to overstate the government's liability" (Pet. i), and the court of appeals properly affirmed that determination. The Court of Federal Claims did not, as petitioner suggests (Pet. 10), deem the penalty calculation "unnecessary." On the contrary, the court separated out the portion of the claim for past damages—which the court de-

termined was probably, but not definitely, fraudulent—and awarded a penalty equal only to the amount of the demand for future damages, which the court had determined was fraudulent in its entirety.

b. In concluding that petitioner's demand for $50.6 million in future damages was fraudulent in its entirety, the courts below did not simply rely on their determination that petitioner knew it was not entitled to payment in that full amount. Rather, those courts explained that petitioner had made no meaningful effort to identify or substantiate any sums to which it *was* entitled. Thus, the court of appeals explained that petitioner's "damages experts at trial treated the certified claim computation as essentially worthless, did not utilize it, and did not even bother to understand it." Pet. App. 14a. The courts below observed as well that petitioner's "claim preparation witnesses inconsistently referred to and interchanged actual, future, estimated, calculated and planned costs." *Ibid.* The Court of Federal Claims found not only that petitioner knew the $50.6 million total to be excessive, but that petitioner "did not honestly believe that the Government owed it *the various amounts* stated when it certified the claim." *Id.* at 133a (emphasis added); see *id.* at 14a.

Because the courts below did not view the future-damages part of petitioner's claim as including both valid and fraudulent line items, or as otherwise containing valid portions that could be severed from the remainder of that part of the claim, they appropriately treated that part of the claim as fraudulent in its entirety for purposes of Section 604. In the court of appeals, petitioner made "virtually no effort to show that the Court of Federal Claims' findings of fraud [we]re clearly erroneous" as to the $50.6 million demand for

future damages. Pet. App. 15a. Although petitioner suggests that some unspecified portion of its demand for future damages was "at least non-fraudulent," Pet. 9, this Court is not a proper arena in which to reassess factual findings made by a trial court after a 13-week trial and based in significant part on credibility determinations. *E.g.*, Pet. App. 54a-55a, 74a-90a, 149a.[4]

If a contractor's fraudulent demand for payment reflects no reasonable effort to identify and substantiate the facts bearing on the contractor's entitlement to federal funds, the government is entitled under the CDA to damages in the full amount of the demand, even if the contractor might have been able to prepare and file a *different* claim that established its entitlement to a lesser sum. That conclusion follows from the plain language of Section 604, which renders a contractor in those circumstances "liable to the Government for an amount equal to [the] unsupported part of the claim." As the analysis of the courts below makes clear, the $50.6 million future-damages part of the claim that petitioner actually submitted was "unsupported" in its entirety because it was baseless and submitted as a negotiating ploy rather than based on a good faith belief that petitioner was entitled to future damages. Even if petitioner could now demonstrate after the fact that it was entitled to some amount of federal money, that would

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[4] Petitioner appears to suggest in passing (Pet. 9 n.2) that its demand for future damages was found to be fraudulent because it was a projection of future costs. That assertion is contradicted by the decisions below. See Pet. App. 8a-9a (acknowledging that the CDA permits a contractor to submit a claim for future costs); *id.* at 132a-133a (recognizing that a contractor may submit a claim that includes future costs).

not prove that the future-damages part of the claim previously submitted was "supported" in any respect.

As the court of appeals recognized, Congress required in the CDA that a contractor claiming more than $100,000 in damages attest under oath "that the claim is made in good faith * * * and that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable," 41 U.S.C. 605(c)(1), in order to prevent contractors from doing exactly what the lower courts found petitioner did here. Pet. App. 17a. Congress sought to penalize contractors who submit claims seeking "an amount beyond that which can be legitimately claimed * * * merely as a negotiating tactic." S. Rep. No. 1118, *supra*, at 20. That is precisely what petitioner did in this case, and the courts below applied the CDA as Congress intended.

2. The decision below does not conflict with any decision of another court of appeals. While petitioner correctly observes (Pet. 7) that the Federal Circuit has exclusive appellate jurisdiction over appeals under the CDA (see 41 U.S.C. 607(g), 609), petitioner identifies no basis for concluding that the question presented here has arisen or will arise with any frequency. And because the decision below is merely a straightforward application of the fraudulent claims provision of the Contract Disputes Act, it will not have the effect of deterring government contractors from submitting legitimate claims for contract adjustments as petitioner suggests. Pet. 12-14. On the contrary, the decision below will deter contractors from submitting baseless claims merely as a negotiating ploy—which is exactly what Congress intended by enacting that provision.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 09-3

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IN THE

Supreme Court of the United States

DAEWOO ENGINEERING & CONSTRUCTION CO., LTD.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Certiorari is warranted because the Federal Circuit's erroneous construction of the statute governing almost all substantial government contracts contravenes Congress's intent and will chill companies' willingness to contract with the government or, at the very least, to identify and avoid significant cost overruns. Given that petitioner faithfully completed the contract at issue in this case, even after suffering losses of more $100 million, there can be no serious argument that petitioner's claim rested on a fraudulent premise that it was entitled to any adjustment in the contract amount. The Solicitor General's attempt to resuscitate the ruling below rests on a significant misinterpretation of the Federal Circuit's holding.

1. Section 604 of the Contract Disputes Act provides for a penalty equal in amount to the part of a contractor's claim that is unsupported because of misrepresentation of fact or fraud. Here, the Federal Circuit affirmed a judgment for the government under Section 604 for the full amount of Daewoo Engineering & Construction Co., Ltd.'s (DWEC) $50.6 million projection of future damages, though on a different ground than adopted by the trial court.

Rather than assess a penalty equaling the amount of the specific components of petitioner's claim that it had found fraudulent (such as certain costs that were duplicative or inflated), the trial court imposed a penalty in the full amount of the entire $50.6 million projection. The trial court's rationale was that DWEC's *purpose* in submitting the projection – to persuade the government to modify

the contract terms to avoid those costs to the government – rendered the whole projection a "negotiating ploy," which the trial court deemed *ipso facto* fraudulent. Pet. App. 77a-78a, 148a, 150a.

Critically, however, that basis for deeming the whole projection fraudulent has now dropped out of the case. The Federal Circuit did not adopt the trial court's view that DWEC's submission of a future damages projection in order to encourage the government to revise the contract made the claim fraudulent. That is not surprising: if adopted, the trial court's view – that a contractor who alerts the government to impending cost overruns if the contract is not modified is engaging in a fraudulent "negotiating ploy" – would effectively prevent the government from learning of and acting upon opportunities to save significant sums of money, to the detriment of the public fisc. Thus, the Federal Circuit explained that a contractor may permissibly seek projected future costs in a Contract Disputes Act claim. Pet. App. 8a. For its part, the government concedes that "claims for future costs are permissible." *Id.*

The lower courts did not identify any alternative basis for deeming petitioner's entire claim to be fraudulent. As the Federal Circuit acknowledged, the trial court did not find that the claim rested on a fraudulent premise or theory, which could produce a finding that the entire claim was fraudulent. Nor did the court of appeals find that DWEC committed fraud merely in submitting a projection of future damages.

The Federal Circuit nonetheless held as a matter of law that the government was entitled to a penalty in the full amount of the projected damages. The court of appeals rested its ruling on the finding that in the "calculation" of its projection, petitioner had included costs arising from "delay" without determining if there "was any contractor-caused delay or delay for which the government was not responsible." Pet. App. 13a. The Federal Circuit thus criticized petitioner's methodology as not sufficiently careful, but it could not, and did not, find that petitioner had thereby committed *fraud*.

The Federal Circuit's ruling that a contractor's error or lack of sufficient care in computing an element of a claim will be transformed into a finding that the contractor is liable to the government for the entire amount of its claim now hangs over every request to modify any substantial government contract. That looming prospect of massive liability will discourage companies from contracting with the government, for fear of the harsh penalties they may face if they submit claims that are later found even partially inaccurate. Those who do continue to contract with the government will be less likely to submit claims identifying projected cost overruns that, through contract modification, could result in significant savings for the government or will factor this risk into their prices, raising the government's costs accordingly.

2. Respondent misreads the court of appeals' decision and advocates an interpretation of the Contract Disputes Act that is inconsistent with the statute's plain language. Respondent reads Section 604 as providing for a penalty equal to the

amount of a contractor's claim that is "unsupported," *without regard* to whether it rests on fraud. DWEC's damages projection was "unsupported," the government says, because DWEC "made no meaningful effort to identify or substantiate any sums to which it *was* entitled." BIO at 8 (emphasis in original). Respondent further argues that, "[i]f a contractor's fraudulent demand for payment reflects no reasonable effort to identify and substantiate the facts bearing on the contractor's entitlement to federal funds, the government is entitled under the [Contract Disputes Act] to damages in the full amount of the demand, even if the contractor might have been able to prepare and file a *different* claim that established its entitlement to a lesser sum." BIO at 9 (emphasis in original).

Respondent's argument disregards the actual language of Section 604, which makes clear that the statute does not penalize claims that are merely "unsupported." Rather, it penalizes "any part" of a claim that the contractor is "unable to support" *because of* "misrepresentation of fact or fraud on the part of the contractor." 41 U.S.C. § 604. The proper amount of the penalty is the amount "equal to *such* unsupported part of the claim." *Id.* (emphasis added). Respondent essentially argues that all unsupported claims are by definition fraudulent, but the statutory language is plainly premised on the far narrower notion that a claim can be unsupported because of misrepresentation or fraud *or* it can be unsupported for other, non-fraudulent reasons. To establish an entitlement to a penalty, the government has to prove not just that the claim is not supported, but also that the contractor's inability to

support the claim is attributable to misrepresentation of fact or fraud. Congress's determination to require a more rigorous showing under Section 604 is not surprising, given the extreme nature of the penalty involved, which as this case illustrates can easily amount to tens of millions of dollars.[1]

Here, the $50.6 million penalty is justified under Section 604 only if DWEC committed fraud with respect to the "part[s]" of the claim that make up that dollar amount – *i.e.*, every dollar of the projection. But not even the government seriously argues that is so. To reach that conclusion would require finding that DWEC actually knew that it was not entitled to *any* future damages, either because it knew that the underlying claims were meritless or because it knew it would not incur any recoverable costs going forward. The trial court certainly made no such finding that at the time it submitted its claim DWEC

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[1] The government cannot lean on the Federal Circuit's comment that DWEC made "virtually no effort to show that the Court of Federal Claims' findings of fraud are clearly erroneous." Pet. App. 15a. The trial court did not find that the entire claim was fraudulent, except insofar as DWEC's purpose in alerting the government to the potential future damages was, at least in part, to persuade the government to change the contract requirements in order to avoid those costs. DWEC argued below – and both the Federal Circuit and the government agree – that such a purpose does not render the claim fraudulent. Because appellate courts decide questions of law rather than fact, petitioner has accepted *arguendo* the trial court's determination that isolated components of its projection were fraudulent. The Federal Circuit's legal error was in failing to limit the penalty imposed to those parts of petitioner's claim.

believed that it was not entitled to any future damages whatsoever.[2] Nor could there be, given that DWEC incurred massive losses exceeding $100 million on the project. The Federal Circuit's opinion made clear that the penalty was *not* based on the notion that the underlying claims were meritless. Pet. App. 13a. Absent such a finding, the government's argument reduces to a simple, but erroneous, recasting of the Contract Disputes Act to provide for a penalty in the full amount of the claim whenever a portion of the claim is deemed to be unsupported. As a matter of law, respondent's and the Federal Circuit's interpretation of Section 604 is dangerously incorrect.

3. Respondent's effort to conjure a rationale for the Federal Circuit's decision leads it to argue that a contractor can be liable for a fraud penalty in the full amount of its claim even if the underlying claim is valid and the contractor would be entitled to some damages if they were calculated differently. BIO at 9. Respondent posits, without citation to authority, that a claim, even a valid one, is fraudulent *in toto* if the claim "reflects no reasonable effort to identify and substantiate the facts bearing on the contractor's

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[2] Respondent repeatedly emphasizes the court of appeals' criticism that, at trial, DWEC's retained damages experts "treated the certified claim computation as essentially worthless, did not utilize it, and did not even bother to understand it." Pet. App. 14a. In addition to being irrelevant to the question of how much of the $50.6 million projected damages claim was fraudulent, this ignores the fact that DWEC's damages experts calculated approximately $29 million in actual damages through June 2003.

entitlement to federal funds." *Id.* Even setting aside the fact that DWEC's extensive, detailed claim submission hardly meets respondent's novel "no reasonable effort" standard, this extraordinary reading of Section 604 would render fraudulent any claim that is found to be the product of a level of effort that is later deemed "unreasonable." This would stretch the concept of "fraud" in Section 604 to cover mere negligence and incompetence, rather than deliberate deception, as was clearly intended by Congress. It would also defy congressional intent: "[t]o the extent that contractors set forth claim items and costs on which they can submit a legitimate argument for recovery, [the Act] would not apply." S. Rep. No. 95-1118, at 20 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5235, 5254. Hypothetically, if a contractor submitted a $50 million claim but failed to support the entire dollar amount, and were to demonstrate a legitimate argument for $40 million of the claim, the Contract Disputes Act would impose a fraud penalty of $10 million (the "unsupported *part* of the claim"), not $50 million.

4. Respondent acknowledges that the Federal Circuit has exclusive jurisdiction over suits brought under the Contract Disputes Act, and does not dispute that an erroneously broad interpretation of Section 604 by the Federal Circuit would discourage contractors from doing business with the government and from submitting legitimate claims, resulting in higher contracting costs for the government. As *amicus curiae* The Washington Legal Foundation points out, nearly 200,000 businesses sell goods and services to the federal government pursuant to contracts totaling in the hundreds of billions of

dollars. Every one of those contracts are subject to the requirements of the Contract Disputes Act and every one of those businesses are exposed to liability to the government under Section 604, as newly interpreted by the Federal Circuit. WLF *amicus curiae* brief at 2-3, 12.

Respondent contends that petitioner has not shown that the question presented here has arisen or will arise with any frequency, but as noted, the ruling below governs claims submitted under virtually every significant government contract. Further, the deleterious consequences of the Federal Circuit's new and startlingly broad interpretation of Section 604 will occur even if the issue is never litigated again. In enacting the Contract Disputes Act, Congress was acutely aware that "the way potential contractors view the disputes-resolving system influences how, whether, and at what prices they compete for government contract business." S. Rep. No. 95-1118, at 4 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5235, 5238. Some meaningful fraction of the hundreds of thousands of government contractors will be deterred from doing business with the government, or will price their goods and services higher than they otherwise would, out of fear of the crippling liability they could suffer under Section 604 if they submit a claim for money that is later found to be even partially inaccurate or compiled with a level of effort that is later deemed unreasonable.

As the *amicus curiae* brief further notes, the Federal Circuit's decision in this case will necessarily lead to an increase in contractor costs, and hence government costs, of preparing claims for submission to the government. According to the government,

even valid claims potentially give rise a fraud penalty for the full amount of the claim if the government deems – *post hoc* – the contractor's effort in drafting its claim to be unreasonable or its claim calculation to be insufficiently precise. Contractors will be all but required to incur the costs of damages experts in preparing claims for even modest amounts, or else risk a "fraud" penalty under Section 604, as well as the other consequences of such a finding (e.g., forfeiture of valid claims and debarment from further government contracting). This added burden will affect all contractors, but especially small businesses who can least afford these additional costs, and construction contractors like DWEC, who often need to bring large claims on short notice.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the petition and supporting *amicus* brief, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

DAEWOO ENGINEERING & CONSTRUCTION CO., LTD,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari To the United States Court of Appeals For the Federal Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTERESTS OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 States.[1] WLF devotes a substantial portion of its resources to defending free-enterprise, individual rights, and a limited and accountable government.

To that end, WLF has appeared before this and other federal courts in numerous cases raising issues relating to the proper interpretation of government contracting law, with an eye to ensuring that entities that contract with the federal government are afforded legal rights commensurate with those afforded to contracting parties generally. *See, e.g., Rumsfeld v. United Technologies Corp.*, 315 F.3d 1361 (Fed. Cir.), *cert. denied,* 540 U.S. 1012 (2003); *Allegheny Teledyne Inc. v. United States*, 316 F.3d 1366 (Fed. Cir.), *cert. denied, sub nom., General Motors Corp. v. United States*, 540 U.S. 1068 (2003).

WLF is concerned that the Federal Circuit's decision, if allowed to stand, will expose companies that

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. More than ten days prior to the due date, counsel for WLF provided counsel for Respondent with notice of its intent to file this brief. All parties have consented to the filing; letters of consent have been lodged with the clerk.

contract with the government to huge, unwarranted penalties if a reviewing court later determines that claims they submitted were even partially inaccurate. WLF is concerned that the fear of such penalties will discourage companies from contracting with the federal government. WLF is also concerned that such fears will deter contractors from submitting meritorious claims for post-award equitable adjustments – and the results of any such reluctance include increased opportunity for federal agency abuse of the procurement process and windfalls for the government. WLF does not believe that Congress intended to create the specter of such crippling penalties when it adopted the Contract Disputes Act.

REASONS FOR GRANTING THE PETITION

The Washington Legal Foundation (WLF) agrees with petitioner that the Federal Circuit committed clear error when it held that under the anti-fraud provision of the Contract Disputes Act of 1978 (Contract Disputes Act or CDA), 41 U.S.C. § 604, the proper measure of damages to be awarded to the government is the entirety of a projected, or estimated, claim, rather than the demonstrably fraudulent individual elements of such a claim. This error has great significance for government contractors.

If the error remains uncorrected, it will potentially affect all of the more than 190,000 businesses that sell the goods and services that the Federal government needs to accomplish its various missions. *See* http://www.usaspending.gov (193,259 companies and individuals received Federal government

contracts in FY2008). The effect on these and future government contractors will be significant because each of them will have to clear a high hurdle to be fairly and adequately compensated when the government changes a contract, as the government does routinely, or when the government breaches a contract. Indeed, the Federal Circuit's error sets a "fraud trap" for contractors that must use estimates to present their legitimate claims for damages consisting of projected future costs to the government.

If the error that is the subject of the petition remains uncorrected, businesses that may consider continuing to provide goods and services, or that may consider entering the federal government procurement arena for the first time, may well choose not to do either. Accordingly, the error will not only undermine Congress's stated policy in enacting the Contract Disputes Act to "insure fair and equitable treatment to contractors," S. Rep. No 95-1118, at 1 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5235, 5235, but it will also undermine the efficient and effective working of the government. For those reasons, the petition for a writ of certiorari to the Federal Circuit should be granted.

I. REVIEW SHOULD BE GRANTED BECAUSE ONLY THIS COURT CAN CORRECT THE FEDERAL CIRCUIT'S MISINTERPRETATION OF 41 U.S.C. § 604, AND UNDO THE DAMAGE IT HAS CAUSED TO THE PROCUREMENT PROCESS

A. The Federal Circuit Misinterpreted 41 U.S.C. § 604 by Including Non-Fraudulent Elements in the Damages Calculation

The Contract Disputes Act's "anti-fraud" provision, codified at 41 U.S.C. § 604, is straightforward:

> If a contractor is unable to support any part of his claim and it is determined that such inability is attributable to misrepresentation of fact or fraud on the part of the contractor, he shall be liable to the Government for an amount equal to such unsupported part of the claim in addition to all costs to the Government attributable to the cost of reviewing said part of his claim. Liability under this subsection shall be determined within six years of the commission of such misrepresentation of fact or fraud.

The plain text of the statute, as well as its legislative history as noted by petitioner, establishes that a contractor that is unable to support *any part* of a claim brought under the Act, when it is determined that the inability to support *that part* of the claim is attributable to misrepresentation of fact or fraud, will be

liable to the government for an amount equal to *such unsupported part* of the claim. The statute does not allow for the Federal Circuit's interpretation that if a claim is tainted by a factual misrepresentation or fraud in *any* of its constituent elements, the *entire claim* is fraudulent, and therefore the entire amount of the claim will be assessed against the contractor as damages, or, in reality, a penalty.

A violation of the Contract Disputes Act must be proved by a preponderance of the evidence. *UMC Electronics Co. v United States*, 249 F.3d 1337, 1339 (Fed. Cir. 2001); *Commercial Contractors, Inc. v. United States*, 154 F.3d. 1357, 1362 (Fed. Cir. 1998). The trial court found only that certain elements of petitioner's claim were overstated, and perhaps fraudulent. *See* Pet. App. 138a-143a (certain equipment acquisition and maintenance costs, production rates, depreciation of scrapped equipment, costs of daily use of some equipment). The trial court also noted that petitioner made rounding errors, and included expressly unallowable costs (alcohol, donations to the Palau government, entertainment, and interest on a letter of credit) in its claim. *See* Pet. App. 147a.

Thus, the actual instances of fraud that were found by the trial court, and affirmed by the Federal Circuit, were discrete and quantifiable. Such isolated examples did not, however, infect petitioner's full $50.6 million claim for projected costs and damages, much less the total claim of $64 million that petitioner put forward.

The Federal Circuit did not make any calculation

or finding that petitioner's *entire* $50.6 million claim for projected costs was based on misrepresentations of fact or was otherwise fraudulent. Likewise, there is no indication in either the trial court's or the Federal Circuit's opinion that the government proved by a preponderance of the evidence that the substance of petitioner's *entire* claim was false or fraudulent.

Accordingly, on a proper construction of Section 604, there was no evidentiary basis for either the trial court or the Federal Circuit to conclude that, under the statute, petitioner should be penalized in the entire amount of its claim for projected costs. Likewise, there is no legal basis in the statute or its legislative history for the Federal Circuit's conclusion that elements of a claim that have not affirmatively been proven to be fraudulent should be included in a penalty that might otherwise be correctly assessed under 41 U.S.C. § 604.

B. The Federal Circuit Misinterpreted What Constitutes a Fraudulent Claim, in Whole or In Part, Under 41 U.S.C. § 604

The Federal Circuit noted that petitioner "apparently used no outside experts to make its certified claim calculation." Pet. App. 13a-14a. This was apparently part of the circuit court's reasoning why petitioner had committed fraud in submitting its claim.

The absence of expert assistance in claim preparation is not fraud, especially considering that Congress's intent in enacting the Contract Disputes Act was to provide an informal and efficient method for the

resolution of claims arising under and relating to government contracts. S. Rep. No 95-1118, at 1 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5235, 5235 ("The act's provisions help to induce resolution of more contract disputes by negotiation prior to litigation; equalize the bargaining power of the parties when a dispute exists; provide alternate forums suitable to handle the different types of disputes; and insure fair and equitable treatment to contractors and Government agencies.") To require contractors – *all* contractors, including small and disadvantaged businesses – to retain experts to help prepare their claims in order to avoid possible assessment of fraud penalties under 41 U.S.C. § 604, as the government can now argue based on the Federal Circuit's opinion, is an erroneous interpretation of the statute and does not comport with Congress's intent in enacting the Contract Disputes Act.

The Federal Circuit also noted with approval that while the trial court did not find that petitioner's reliance on legal theories such as defective specifications, superior knowledge, and impossibility of performance was fraudulent, the trial court was correct in finding that petitioner's "$50.6 million projected cost calculation was fraudulent." Pet. App. 13a. As the Federal Circuit went on to say:

> [Petitioner's] calculation assumed that the government was responsible for each day of additional performance beyond the original 1080-day contract period, without even considering whether there was any contractor-caused delay or delay for which the government was not responsible.

Id. In other words, according to the Federal Circuit, if a contractor does not take pains to separate out all elements of claimed damages for which it may itself ultimately be shown at some unknowable point in the future to be responsible, or for which the government may ultimately be shown not to be responsible, the contractor's entire claim is fraudulent.

This conclusion represents a sea change in the way the lower courts treat government contract claims. The mere claiming of all costs incurred – the use of the "total cost method" of claiming compensation under a contract – is a well-recognized basis for contractor claims in certain circumstances. The specificity required for a contractor's proof of damages is related to the nature of the government's breach. The more fundamental, intrusive, or continuous the government's breach, the less specific a contractor's proof of damages needs to be. *See, e.g., Ralph L. Jones Co. v. United States*, 33 Fed. Cl. 327, 336 (1995) (applying total cost method to determine damages where government agency ordered changes that it knew would be difficult for contractor to prove with definitive evidence of costs incurred, and where agency was responsible for all associated extra costs); *Concrete Placing Co. v. United States*, 25 Cl. Ct. 369, 377-78, *aff'd*, 985 F.2d 585 (Fed. Cir. 1992) (court allowed contractor to change proof at trial from actual cost to total cost method because of difficulty in distinguishing between work caused by defective specifications and work covered by contractor's bid). In the instant case, when petitioner submitted its claim, it believed that the contract

> [C]ontained a misleading weather-delay clause

> and defective road design specifications, that the government breached its duty to disclose its superior knowledge of its weather-delay calculation methods, and that the contract was thus impossible to perform.

Pet. App. 6a. In these circumstances, it is not inappropriate for a contractor to calculate its damages using the total cost method. Moreover, as noted above, the trial court did not find that these theories were "fraudulent"; it merely found them to be without merit. Pet. App. 13a. How, then, could petitioner's method of calculating delay damages, which did not take into account the possibility that either petitioner itself might have been liable for some of the delay or that the government might *not* have been liable for *all* of the delay – a calculation that amounted to the use of the total cost method – be fraudulent? Petitioner's claim for delay damages was merely that: a claim founded on a recognized government contracting method of calculation. It was for the government to argue against the claim on a factual basis, and for the trier of fact to make the ultimate determination as to how much, if any, of the delay was compensable to petitioner. It was error as a matter of law for the trial court to conclude that petitioner's *entire* delay claim was fraudulent in the circumstances, and it was error for the Federal Circuit to affirm the trial court's judgment.

Moreover, the Federal Circuit erred in affirming the trial court's finding that there was fraud in the absence of any false documents, or other false information, or a false certification. Under the False Claims Act, fraud against the government exists, inter

alia, when a person "knowingly presents . . . a false or fraudulent claim for payment or approval," 31 U.S.C. § 3729(a)(1), or "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved." 31 U.S.C. § 3729(a)(2). "Knowingly" is defined to include situations where a claimant "has actual knowledge of" the falsity of information presented to support a claim, "acts in deliberate ignorance of the truth or falsity" of such information, or "acts in reckless disregard of the truth or falsity" of such information. 31 U.S.C. § 3729(b). Likewise, under the Contract Disputes Act, a "misrepresentation of fact," which is one of the elements required for imposition of the penalties provided for in 41 U.S.C. § 604, is "a false statement of substantive fact, or any conduct which leads to a belief of a substantive fact material to proper understanding of the matter in hand, with intent to deceive or mislead." 41 U.S.C. § 601(9).

Aside from certain conclusory statements ("The certified claim itself was false or fraudulent and [petitioner] knew it was false or fraudulent," Pet. App. 121a-122a; "Witnesses admitted that [petitioner] files a certified claim as a negotiating ploy," Pet. App. 129a; "[Petitioner] did not honestly believe that the Government owed it the various amounts when it certified the claim," Pet. App. 133a), the trial court did not make any specific finding that petitioner filed any false documents or otherwise submitted any false information in support of its claim, or falsely certified its claim as required by 41 U.S.C. § 605(c)(1). Without such findings, there was no fraud, and the Federal Circuit erred in affirming the trial court's judgment.

II. REVIEW SHOULD BE GRANTED BECAUSE THE FEDERAL CIRCUIT'S MISINTERPRETATION OF A KEY CONTRACT DISPUTES ACT PROVISION UNDERMINES FUNDAMENTAL COMPONENTS OF THE FEDERAL PROCUREMENT PROCESS

A. The CDA'S Anti-Fraud Provision Applies to All Executive Branch Contractors

In the decision below, the Federal Circuit held that under the Contract Disputes Act's anti-fraud provision, 41 U.S.C. § 604, the proper measure of damages to be awarded to the government is the entirety of a projected, or estimated, claim, rather than the demonstrably fraudulent individual elements of such a claim. As the petition demonstrates, this holding is wrong and has great significance for government contractors.

The Contract Disputes Act applies to all contracts, express or implied, entered into by an Executive Branch department or agency of the United States government (including some non-appropriated fund activities) for the procurement of property (other than real property), services, and real property construction, alteration, repair or maintenance, as well as for the disposal of personal property. 41 U.S.C. § 602(a). The Act also applies to procurement contracts of the Tennessee Valley Authority. *Id.*, § 602(b). Accordingly, the Federal Circuit's erroneous holding with regard to the measure of damages under 41 U.S.C.

§ 604 will affect all contracts for the acquisition of goods or services by Executive Branch agencies. Thus, based on statistics for FY2008 alone, a significant portion of over 190,000 contractors, with pending contracts totaling in the hundreds of billions of dollars in value, will be affected by the lower court's error. *See* http://www.usaspending.gov. To date in FY2009, over $221B worth of contracts have been awarded to nearly 113,000 contractors. *See id.*

Many current and future contractors will be affected adversely by the Federal Circuit's error, because the Federal Circuit has set a disincentivizing "fraud trap" for contractors that must use estimates in presenting their contract claims to the government, as explained hereinafter. Such a situation must not be allowed to continue.

B. The Federal Circuit's New and Unreasonably Low Standard of Proof for Fraud Places Thousands of Current and Future Government Contractors at Risk

The CDA applies to all contracts awarded by executive agencies and to all non-routine requests for payment under those contracts, which are called "claims." A claim is a demand for payment arising under a contract (pursuant to a remedy-granting clause) or relating to a contract (based on an alleged breach). *See* 41 U.S.C. § 605(a); 48 C.F.R. § 52.233-1(b), -(c) (contractual Disputes clause). *See also United States v. Utah Constr. & Mining Co.*, 384 U.S. 394 (1966).

Amounts claimed by contractors often include estimates that require only minimal support to be asserted. As acknowledged by the Federal Circuit in its decision below, estimates may be appropriate in any claim. *See* Pet App. 8a. *See also Ralph L. Jones Co.*, 33 Fed. Cl. at 336 ("It is enough that the contractor supply the court with a 'reasonable basis for computation, even though the result is only approximate"; that is, "[t]he court needs only enough evidence to make a fair and reasonable estimate'") (citing *Miller Elevator Co. v. United States*, 30 Fed. Cl. 662, 702, *appeal dismissed by* 36 F.3d 1111 (Fed. Cir. 1994)). *See also Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931) ("The rule which precludes the [recovery] of uncertain damages applies to such as are not the result of the wrong, not to those damages which are definitely attributable to the wrong and are only uncertain in their amount."). The Federal Circuit's conclusion, however, that estimates of future costs are inherently suspect, and are somehow broadly tainted by association with some misrepresentations or fraudulent representations in the same claim, so as to subject the claimant to a penalty in the entire amount of the claim, flies in the face of these established principles of government contract dispute resolution with regard to estimated damages.

The Federal Circuit has thus effectively established a low standard of proof of fraud by imposing elevated requirements for proof of estimates that exist nowhere else in the law. While the government is certainly entitled to protect itself from fraud, estimates of contract damages do not necessarily equate to fraud, especially when those estimates are linked to sound

legal theories. The Federal Circuit has exacerbated this problem, though, by holding that if the government can meet the unjustifiably low level of proof required by the circuit's decision below, contractors will face having to pay penalties and forfeiting even their "untainted" claims.

If the Federal Circuit's holding is not reversed, any claim that involves an estimate in any amount or any percentage of the total will be subject to complete forfeiture. This will permit the government to avoid paying actual costs incurred by contractors as well as "valid" estimates that meet the standards of Rule 11 (of both the Court of Federal Claims and the district courts) and the Contract Disputes Act certification for claims exceeding $100,000, and will accordingly create unjustified financial windfalls for the government. In this era of daunting budget deficits, the incentive for the government to misuse and abuse the Federal Circuit's holding is significant.

Likewise, if the holding below is not reversed, any claim is subject to an argument that the contractor did not do enough to support its estimate; that is, that the contractor did not engage experts to assist in formulating the claim, or engaged the wrong experts, or relied on the wrong numbers, or any number of conceivable arguments. Such arguments could always be made to attack the trustworthiness of damage estimates, certainly, but under the Federal Circuit's holding, those arguments are no longer limited to lessening any damages a contractor may ultimately recover; now they would carry the added threat of converting the contractor's entire claim into a penalty

payable to the government. The Federal Circuit's decision blurs the distinction between legitimate, good faith arguments against the merits of a contractor's claim, and what will in all likelihood become routine allegations of fraud by the government if the decision is allowed to stand.

Moreover, if the Federal Circuit's holding is allowed to stand, then contractors that are confronted with a circumstance in which actual damages are difficult to ascertain except on the basis of estimates will have to decide whether to (a) continue to perform the affected contract and be subjected to government arguments regarding unsupported claims and total forfeiture and penalties, or (b) stop performing in potential breach of their obligation under the Disputes clause to continue performance. *See* 48 C.F.R. § 52.233-1(i) ("The Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under the contract, and comply with any decision of the Contracting Officer.").

C. The Federal Circuit's Holding Thwarts Federal Procurement Policies and Creates Disincentives for Contracting with the Government

The Federal Circuit's holding will lead to contractors not believing that they can get a fair shake in the claims process, and ultimately may lead potential sellers of goods and services to the government to conclude that the risk of doing business with the government – and facing potential multi-million dollar

penalties for bringing legitimate claims based in part on good faith estimates – outweighs any potential reward for accepting government contracts.

As discussed above, the decision will discourage government contractors from pursuing legitimate claims for fear that the government will attempt to penalize them whenever a claim includes an estimate of damages. Besides being contrary to law, such a result is contrary to Congress's expressed intent in enacting the CDA to "insure fair and equitable treatment to contractors," S. Rep. No 95-1118 at 1 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5235, 5235.

The Federal Circuit's holding also creates disincentives to current contractors to continue competing for government contracts, as well as to potential contractors that may contemplate entering the government contracting marketplace for the first time. Such a result could be critical to the government by lessening competition, and thus raising prices and lowering quality, in such areas as construction and public works in an era when the government is attempting to rebuild the nation's infrastructure. *See generally, e.g.,* American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5.

The impact on both existing and potential contractors will be especially hard on certain types of businesses. Small and small disadvantaged businesses, for example, will be unduly burdened because claim preparation and resolution will become too expensive, requiring, if the Federal Circuit's holding stands, expensive experts to assist in claim preparation and

presentation. This is contrary to the Federal government's stated policy of encouraging the participation of small and small disadvantaged businesses to seek and perform government contracts. *See, e.g.*, 10 U.S.C. § 631(a) ("It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns in order to . . . insure that a fair proportion of the total purchases and contracts or subcontracts for property and services for the Government (including but not limited to contracts or subcontracts for maintenance, repair, and construction) be placed with small-business enterprises . . . ."); 48 C.F.R. § 19.201(a) ("It is the policy of the Government to provide maximum practicable opportunities in its acquisitions to small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns.").

The holding will also discourage businesses that primarily sell in the non-governmental, commercial marketplace from doing business with the Federal government. Such "commercial" concerns, like small businesses, will view government contracting as unnecessarily expensive because of the necessity to hire experts to assist in claim preparation and presentation. Moreover, because of the viability of their non-government business, such "commercial" concerns will more readily than others view the rewards of selling to the government as incommensurate with the risk of having any claim turned into a penalty under the Federal Circuit's interpretation of 41 U.S.C. § 604. This is also contrary to the government's stated "preference

for the acquisition of commercial items." *See* 48 C.F.R. § 12.000. *See also* 10 U.S.C. § 2377(b)(1); 41 U.S.C. § 264b(b)(1) (preferences of Department of Defense and other Executive Branch agencies, respectively, for acquisition of commercial items; heads of agencies to ensure that procurement officials, "to the maximum extent practicable – acquire commercial items . . . to meet the needs" of the agency).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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